Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GARY A. WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it upheld the military judge's denial of the petitioner's request for investigative support even though the unique nature of conducting depositions of foreign nationals in the United Arab Emirates gave justification for the United States to use a deposition officer who initially investigated the allegations against the petitioner.

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The petitioner, Staff Sergeant Gary A. Washington, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 26 August 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Washington*, 46 M.J. 477 (1997), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, reported at *United States v. Washington*, 42 M.J. 547 (AF Ct. Crim App 1995) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 26 August 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1996) and 10 U.S.C. 867(a)(3) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides, in relevant part:

"No person shall . . . be deprived of life, liberty, or property, without due process law..."

STATEMENT OF THE CASE

Petitioner was tried on 13–17, 20–24, & 26–28 July 1992 at Shaw AFB, South Carolina by a General Court-Martial. He was sentenced to a bad conduct discharge, reduction to airman basic (E–1), 10 years confinement, forfeitures of $250 pay per month for 10 years, and a $70,000.00 fine. In its 21 April

1995 decision of the case, the Air Force Court of Criminal Appeals determined that petitioner had been subjected to illegal pretrial punishment and ordered that he be given a total of 266 days of pretrial punishment credit.

On 13 March 1996, the United States Court of Appeals for the Armed Forces granted review of the decision of the Air Force Court of Criminal Appeals pursuant to 10 U.S.C. 867(a)(3). The Court granted review of an additional issue on 8 May 1996. On 26 August 1997, the Court of Appeals for the Armed Forces affirmed the lower court's decision. The court held that no reversible error occurred in this case, concluding that the military judge's decision to deny government-funded investigative assistance to the defense was not an abuse of discretion. The court further ruled that the petitioner's pre-trial statements were given voluntarily and that any legal error in appointing the deposition officer was harmless. *United States v. Washington,* 46 M.J. 477 (1997).

In August of 1990, various support elements of the 363d Fighter Wing (FW) at Shaw AFB, S.C. deployed to the United Arab Emirates (U.A.E.) in support of Operation Desert Storm. See Record 342. Among those deploying were Major Robert Russell, Office of Special Investigations (OSI) Special Agent (SA) John Pecko, petitioner, and Colonel Steven Rust. While serving as the 363d FW Deputy Staff Judge Advocate at Shaw AFB, upon his deployment, Major Russell assumed the position of Staff Judge Advocate for the 363d provisional, i.e. "deployed," wing. Record 340–41. Petitioner, a member of the 363d Contracting Squadron, deployed as a contingency contracting officer. Record 25. To assist him in the performance of his duties, he was assigned a local U.A.E. resident, Mr. Omar Hassan, to serve as his driver and interpreter. Record 1367. In late December 1990, authorities received word that petitioner was allegedly involved in the practice of receiving unlawful "kickbacks" from local area

vendors. See Record 494, 1368. Some two months later, on 6 March 1991, at around 1800 hours, petitioner was apprehended by Special Agent Pecko outside Lina Electronics, the business of a UAE merchant. During the apprehension, petitioner was physically grabbed and then frisked. Record 29. He was then escorted to a four-wheel drive vehicle, forced inside it, and told to stay put. Record 29. There were four agents involved in petitioner's apprehension, and they made it clear that petitioner was not free to leave. Record 92, 585–86. Upon arriving at the offices of the AFOSI, petitioner was read his Article 31 rights. Record 32. Petitioner repeatedly denied any wrongdoing, even after being shown a tape which purportedly showed him receiving the marked money from Nabih Taraby. Record 436, 587.

Subsequent to the showing of the tape, petitioner's commander, Colonel Rust, who had also seen the tape, angrily confronted petitioner, telling him that he was nothing but a "little black jew" and that he wanted to spit in the petitioner's face. Record 36, 441, 510, 2015, 2018.[1] After rendering these comments, Colonel Rust gave petitioner a written order barring him from contacting any individuals in the cities of Abu Dhabi and Dubai with whom he'd had any dealings or contact with in his capacity as a contracting agent; furthermore, the order prohibited petitioner from discussing any of the allegations against him with "any other active duty personnel who were or are your co-workers within the Contracting or Accounting office." Attach 4 to App. Ex. XIV. At the time Colonel Rust gave this order to petitioner, he had his legal advisor, Major

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[1]Colonel Rust testified at trial that he did not call the petitioner a black jew, but rather informed him that he was known by the merchants downtown as a "black jew" [and, according to the OSI he was also referred to as a "little monkey", Record 1410]. The Colonel did admit, however that upon first confronting the petitioner after the apprehension that he told him: "Gary, if I could, I'd spit in your eye." Record 559.

Russell, present. Record 566. The following morning, petitioner was returned to OSI's interview room, where their interrogation of him resumed at roughly 0900 hours and continued on for the next six hours. Record 42–4, 450.

Instead of terminating the interview immediately, as required by *Edwards v. Arizona,* 451 U.S. 477 (1981), SA Pecko told petitioner that if he wanted to, he could talk to Colonel Rust. Record 46. As SA Pecko described his situation, ". . . at that point I had tried to interview him and get his admissions to receiving money and it was apparently not going anywhere, he was not going to admit to anything else and say anything else . . ." Record 511. Feeling that he was without recourse to talk with anyone else (Record 47) petitioner agreed to talk to Colonel Rust. Record 46, 47. The visit was coordinated with Major Russell, the Staff Judge Advocate, see Record 511.

On 22 March 1991, when petitioner did return to Shaw AFB, he was advised that he'd been transferred from the contracting office to the squadron orderly room. Record 56. Too, to parallel the order petitioner had been given by Colonel Rust not to speak with any of his contracting colleagues about the allegations against him, personnel working in the Shaw AFB contracting office were ordered not to talk to or contact petitioner. Record 290, 300–301. On 10 July 1991 petitioner was issued a letter advising him of his reassignment to the Correctional Custody facility and giving him a "legal order" "not to enter the Base Contracting facility or make contact in any way (written or verbal), with personnel assigned to that office." App. Ex. II, Attach 3. By then, Colonel Rust, Major Russell and SA Pecko had, like petitioner, all returned to Shaw AFB. Record 424, 554, App. Ex. XXX. Major Russell and SA Pecko resumed their prior duties as the 363d FW Deputy SJA and OSI detachment commander, respectively.

When reviewing petitioner's correctional custody duties, the Air Force Court below found that they constituted illegal pretrial punishment in that they required petitioner to personally perform '. . . menial "weeds and seeds" tasks, such as landscaping, planting, and weeding. He also hauled trash, painted, and cleaned duck droppings from rocks at the base duck pond." 42 M.J. at 555. Unable to ascertain any legitimate nonpunitive purpose for petitioner's assignment to the correctional custody facility, the Air Force Court held petitioner to have suffered 266 days of illegal pretrial punishment (from his assignment there on 10 July 1991 until 1 April 1992). *United States v. Washington,* 42 M.J. 547, 563 (AF Ct. Crim App 1995).

On 25 May 1992 charges were preferred against petitioner; the Article 32 hearing was scheduled for 27 March 1992. In conjunction with a request for a delay of the proceedings and appointment of a defense interpreter, App. Ex. II, Attach 9, defense counsel submitted, on 23 March 1992, a request that the convening authority appoint an OSI investigator to assist the defense. App. Ex. III, Attach 17. Counsel went on to note that:

> The barriers in this case include vastly different cultures and languages. Also the fact that the Government's investigation included agencies other than AFOSI, such as the UAE State Police. The Defense feels it is imperative to have an investigator trained in uncovering witnesses, interviewing witnesses about prior statements (sic). An investigator with contracting knowledge and with experience with Arabic cultures would be invaluable to the Defense. . . . The situs of these charges, the UAE, is somewhat remote and has not (sic) other ADA/ADC support. There is, in fact, very little military support of any kind available to

> the Defense. Because of the amount of travel necessary, coupled with current case load, the detailed Defense Counsel is unable to conduct a proper investigation without this support. Very few cases would be as needy for this type of support as is this case. The conspiracies and schemes alleged by the government are complex and difficult to understand without some expertise. The witnesses are mostly foreign nationals and under no obligation to cooperate . . .

App Ex III, Atch 17.

On 1 April 1992, the convening authority responded with a letter rescinding the no-contact orders issued to petitioner the previous year (on 6 March 1991 and 10 July 1991). App. Ex. III, Attach 6. He advised defense counsel that he'd instructed the Investigating Officer to delay submission of his Article 32 report until 3 April 1992 in order that the defense might have additional time for submission of matters. *Id.*[2] Additionally (in this same letter), the convening authority denied the defense request for an interpreter on the grounds that all relevant statements were in English, and the individuals who made the statements were able to speak English. *Id.* Yet, this was untrue as the actual statements from the witnesses were written in Arabic. Record 381. SA Pecko indicated that because the witnesses did not know how to write in the English language, he would, after having completed his interview of them, write up a statement for

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[2]On his own, the Investigating Officer apprised the defense that he would delay submission of his report until 11 April 1992 to give them a little more time than that provided by the convening authority. The defense made no submissions during this "extension," later explaining that one week's additional time was simply incapable of making up for eighteen months' denial of the Accused's access to witnesses and evidence. Record 634.

them based upon their prior dialogue. Record 602. He then sent the English statement to a translator and had it translated into Arabic. *Id.* The witness was then asked to review the resulting Arabic statement, swear to and sign it. *Id.*[3] Yet, the government investigators had great difficulty communicating with the local nationals in the U.A.E. A non-exhaustive selection of such difficulties are to be found at Record 1691, 1696, 1702, 1704, 1707, 1716–17, 1720 (Shaheen); Record 1775, 1777–78, 1783, 1790, 1794, 1796, 1807, 1818, 1820, 1828–29 (Nehnaha); Record 1952, 1959, 1971–72, 1984, 1936, 1992, 1995, 1999, 2005 (Hassan).

Lt Colonel Winborn, a fifteen-year veteran of the Judge Advocate General's division, Record 356, testified on cross-examination as to the basis for his recommendation to the convening authority that the defense request for investigative assistance be denied. See Appendix C. With regard to the Government and the generation of its case, the prosecution pointed out (in arguing against a speedy trial motion) that they had numerous witnesses and that the case required extensive investigation to perfect the evidence. Record 729. Over the course of their eighteen-month investigation, the Government utilized a minimum of ten OSI investigators and four other expert assistants: (1) SA Pecko, Record 423; (2) SA Bland, Record 576; (3) SA Lukens, Record 539; (4) SA Barry, Record 1112; (5) SA MacLear, Record 1116, 1137; (6) SA Krueser, Record 810; (7) SA Messick; (8) SA Shannon; (9) SA Meduna; (10) SA Price; (11) handwriting analyst Sperry, Record 1848; (12) an unidentified fingerprint analyst, Record 1846; (13) U.A.E. security force officer Capt Solomon as an interpreter, App. Ex. XXVIII, I.O.Ex. 34 at 4; (14) and embassy translator George Wilson, *id.* at I.O. Ex. 26.

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[3]There was one exception: "Mahmoud" wrote his statement in Arabic, and this was then translated into English. Record 601–02.

At trial, the defense not only moved to suppress petitioner's statement above, App. Ex. VII, but also argued that petitioner's due process rights had been violated by virtue of the convening authority's denial of an interpreter and investigative assistant. App. Ex. II and III. Implicitly referring to the passage of time and international complexities, counsel opined that with the loss of witnesses and potential evidence, the only appropriate recourse was to dismiss the charges. The military judge denied both motions, Record 792-93, finding a lack of any unlawful inducement, coercion, or unlawful influence exerted upon petitioner with regard to his confession, App. Ex. LVIII, and holding, with regard to the request for investigative assistance that—

> "The key to a successful demonstration of necessity for an investigator is a plausible showing that the investigator could obtain information that the defense and its staff would not be able to obtain on its own. I find that the defense has failed to make such a showing. The government made all its witnesses available to the defense when the parties were in the UAE for the videotape depositions. Any background checks which needed to be done could have been done by the defense team when they were in the UAE. Any documents which are pertinent to the case were supplied by the government. Finally, the defense appears to be on a "fishing expedition" as to defense witnesses who "may exist who can refute the charge" or "may be helpful." In this respect the defense has failed to show any more than a mere possibility of assistance."

App. Ex. LIX, Subsection C.

In April 1992, Major Robert Russell, Deputy Staff Judge Advocate for the 363d Fighter Wing, learned that his boss, Lt

Colonel Winborn, intended to recommend that he (Major Russell) serve as the deposition officer for the deposition hearing scheduled to commence with regard to petitioner's case on 17 May 1992 in the U.A.E. (United Arab Emirates). App. Ex. XXX. On 24 April 1992, the defense, having also learned of this, sent a letter to Lt Colonel Winborn objecting to the proposed appointment of Major Russell as the deposition officer. Atch 1 to App. Ex. III. The defense lodged its objection against Major Russell because of his prior service as the Staff Judge Advocate for the deployed provisional wing and his advice and consultation while in that capacity with SA Pecko, the lead investigator on petitioner's case. *Id.* The defense noted that, "Since these depositions are to be conducted overseas, now seemed the more appropriate time to raise this issue. I trust that you will forward this objection to the appropriate authority when the appointment is made. " *Id.* On 12 May 1992, Lt Colonel Winborn sent to the military judge a request for authorization of the depositions. Record 398. That same day Major Russell executed an affidavit verifying his prior involvement in petitioner's case. *See* page 10 of the 18 May 1992 deposition session, Vol I of the three deposition sessions. It was Major Russell's understanding that this affidavit was forwarded, along with Lt Colonel Winborn's nomination of him as the deposition officer, to the Convening Authority. *Id.* at 12. (Whether the defense objection of 24 April was also forwarded is unknown from the record.) The following day, on 13 May 1992, the military judge authorized Lt Col Winborn's request for depositions, Record 399, and that same day (13 May 1992), the Convening Authority appointed Major Russell as the deposition officer. App. Ex. XXIII.

At the start of the deposition hearing, the defense renewed their objection to Major Russell serving as the deposition officer. Page 10 of the 18 May 1992 deposition

session, Vol I of the three deposition volumes. Stating that "your affidavit indicates that you obviously had a very active part in the—the pre-prosecution of this case," defense counsel asked that Major Russell be sworn so that defense counsel could ask him questions and develop a record of his prior involvement in the case: "I'm very concerned—I don't think the judge is going to be able to rule on our objection to you sitting unless I can get this as a matter of record, and I would respectfully ask that you be sworn as a witness at this time and me be allowed to ask you questions." *Id.* at 11. Replying, *inter alia,* that he would be "available at any time in the future [for the trial itself], Major Russell determined that "as far as me testifying at this time, I do not think that appropriate and will not do so." *Id.*

Petitioner's trial commenced at Shaw AFB on 13 July of 1992. Before the military judge, the defense once again objected to Major Russell having served as the deposition officer. App. Ex. III at page 7. Just several weeks prior to the start of petitioner's trial, Major Russell left Shaw AFB (at the end of June—Record 340) and did not personally submit to questions at petitioner's trial; instead, his "testimony" was presented via a stipulation of expected testimony. App. Ex. XXX.

Pursuant to the testimony of Lt Colonel Winborn, the military judge ultimately premised her ruling upon the following facts as found by her:

> "The OSI in the U.A.E. kept Maj Russell advised of their progress in the Washington case but most of their legal advice came from the main base office at Shaw. After his return to Shaw AFB, Major Russell was the Deputy Staff Judge Advocate but functioned mainly in a civil law capacity. Captain Joseph was the Chief of Adverse Actions and Major Russell had little to do with the Washington case."

App. Ex. LX. Lt Colonel Winborn indicated that during the period of Major Russell's deployment, he (Lt Colonel Winborn) and Major Russell had weekly consultations, Record 341–42, and Major Russell decided what from those consultations should be "passed on" to the OSI. Record 410.

Additionally, Major Russell's stipulation of expected testimony provided other facts not referenced by the military judge: While serving as the Staff Judge Advocate for the deployed wing, Major Russell reviewed written witness statements, as well as OSI videotapes, and audiotapes pertaining to petitioner's case. App. Ex. XXX, para 1. He "advised SA Pecko and Colonel Rust as to the legal aspects of the investigation, and the potential charges that could be levied against the accused." App. Ex. XXX, para 1. (In his own trial testimony, Colonel Rust referred to Major Russell as "my legal advisor, " Record 566–7, and testified that he had his legal advisor (Major Russell) present with him when he issued petitioner the no-contact order following petitioner's apprehension. Record 566. Indeed, it was upon Major Russell's recommendation that he'd given petitioner the order. Record 568.) Upon returning to Shaw AFB and there resuming his position of Deputy Staff Judge Advocate for Lt Colonel Winborn, Major Russell "reviewed the charges for administrative correctness and attended the January 1992 meeting with defense attorneys." App. Ex. XXX, para 1. The purpose of this latter meeting was for the Government to present its case to the defense in an effort to persuade the defense of its strength, apparently in the interest of fostering pre-trial plea negotiations. See Record 531–32.

At one point, the military judge was moved to ask trial counsel, "Don't you think that the appearance [of appointing Major Russell as the deposition officer] is kind of bad though?" Record 732. To this trial counsel replied—

> "In an ideal world, yes, your Honor, it would have been perhaps better not to have appointed the individual that had been serving as the staff judge advocate at the deployed site, however, those—or that deployed position gave him some of the unique qualifications that were felt necessary to facilitate the obtaining of assistance in a foreign country for the purpose of conducting a fair and orderly deposition of the witnesses."

R. 732.

Earlier, Lt Colonel Winborn testified that he nominated Major Russell as the deposition officer because (1) Major Russell was a major, and in the Middle East majors were considered to be very important persons, and (2) given Major Russell's prior deployment to the U.A.E., he had "experience" there. Record 412. Lt Colonel Winborn "wanted to make sure that we had a deposing officer who—who knew the country and had the rank where he could go forward to either the Embassy or the host country and try to get cooperation if we had problems with witnesses." Record 412.

"At the depositions, some of the witnesses had trouble understanding the English language; however, the DO [Major Russell] did not feel as though a translator was necessary." App. Ex. XXX at para 10. Before any of the witnesses had been deposed, the defense objected to the deposition hearings because the Convening Authority had earlier denied their request for appointment of a defense interpreter. Page 5 of 18 May 1992 deposition session, Vol I of the three deposition volumes. The defense noted that the Convening Authority had denied the defense request because he'd been told that all the witnesses spoke English, and their written statements had been provided in (translated to) English. Id. This information had come from Lt Col Winborn, who in turn had received it from Major Russell (and SA Pecko). Record 379.

Defense counsel further noted that —

> "Upon arrival over here, it has become obvious that an interpreter would be of a great assistance. It's now my understanding that the government is wanting to use an interpreter during the depositions and, in fact, most of the witnesses insist or have themselves requested an interpreter being here for their – for their examination."

Page 5, 18 May 1992 deposition session, Vol I of three deposition volumes. As Mr. Mahmoud Nehnaha later answered a query while being deposed:

> A: This is not my language—this is not my main language, please.
>
> Q: Do you understand? Okay, let me see . . .
>
> A: If it is my main language, I can understand.

R. 1838. Counsel's subsequent effort to rephrase his query to Mr. Nehnaha's level of understanding proved unsuccessful as Mr. Nehnaha relayed that his mind was "closed" to the question. R. 1839. For a major breach in communicative understanding see the testimony, or rather the attempt to elicit it, from Mr. Shaheen at Record 1708–1715 (reproduced at the Appendix). Other witness difficulties are to be found at Record 1691, 1696, 1702, 1704, 1707, 1716–17, 1720 (Shaheen); Record 1775, 1777–78, 1783, 1790, 1794, 1796, 1807, 1818, 1820, 1828–29 (Nehnaha); Record 1952, 1959, 1971–72, 1984, 1936, 1992, 1995, 1999, 2005 (Hassan).

When defense counsel interrupted the deposition proceedings to request a translator due to difficulties one of the witnesses was experiencing in understanding his questions, Major Russell closed discussion of the matter by stating that, "I am not going to bring in a translator at this time. I may later." Page 27, 20 May 92 deposition of Mr. Shaheen, Vol II of the three deposition volumes. After noting

that defense counsel's objection to proceeding without a translator was a continuing one, Major Russell did not, at any time during the depositions, bring one in.

In arguing against the defense challenge to Major Russell's appointment as the deposition officer, trial counsel argued that Major Russell had not been in a position to influence the proceeding itself; that his duties were ministerial and consisted primarily of administering the deponents an oath. Record 733. Consistent with the arguments of trial counsel, the military judge found that:

> ". . . the only Manual [for Courts-Martial] requirements to be a deposition officer are that the person be an officer who is authorized to administer oaths. There is no requirement that a deposition officer act in a judicial capacity in the same sense as a military judge or Article 32 Investigating Officer. There is no requirement the deposition officer have no prior involvement in the case. However, it would be preferable if the deposition officer were impartial and unbiased."

App. Ex. LX. Based upon this view of the law and the factual basis previously referenced, the military judge held that under the circumstances of the case and given the administrative nature of a deposition officer's duties, Major Russell's appointment was appropriate and he was not subject to disqualification.

REASON FOR GRANTING THE PETITION

As a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary in order to prepare an adequate defense. *United States v. Mustafa,* 22 M.J. 165 (C.M.A. 1986), *cert denied,* 479 U.S. 953 (1986); *United States v. Garries,* 22 M.J. 288,

290 (C.M.A. 1986), *cert denied,* 479 U.S. 985 (1986). *Cf. Ake v. Oklahoma,* 470 U.S. 68 (1985)(Accused must make a threshold demonstration of necessity when seeking employment of an expert). Upon an appropriate showing, a military accused has the resources of the Government at his disposal. *See* Art. 46, U.C.M.J., 10 U.S.C. 846; R.C.M. 703(d), Manual for Courts-Martial, United States 1984. The showing which an accused is required to make is one of "necessity," *Garries,* 22 M.J. at 288: "a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Robinson,* 39 M.J. 88 (C.M.A. 1994), *quoting Moore v. Kemp,* 809 F.2d 702, 712, *cert denied,* 481 U.S. 1054 (1987).

Where an accused and his counsel are unable to meet the "necessity" threshold due to practical difficulties in developing the defense theory of the case, the defense should be provided the tools with which to overcome those difficulties, enabling it to at least potentially gather evidence for laying a foundation for the necessity of independent investigative assistance. *See United States v. Gonzalez,* 39 M.J. 459 (C.M.A. 1994), *cert denied,* 513 U.S. 965 (1994)(defense provided with interpreter who could have been used in the production of evidence for establishing the need for further investigative support); *Half-Acre v. Chambers,* 5 M.J. 1099 (C.M.A. 1976)(government ordered to provide accused and defense counsel transportation to and from Karachi, Pakistan to conduct investigation).

In the instant case the defense established "necessity's" first prong (reasonable probability that an expert would be of assistance to the defense) by explaining "why an investigator was needed, what the investigator would do, and why petitioner's [counsel] could not perform any additional investigative work needed." *Garries* at 291. The defense

explained that **an investigator was needed** due to the complex nature of the alleged offenses, the situs of the offenses being overseas, the majority of Government witnesses being overseas, and cultural and language barriers. Evidence of the cultural and linguistic barriers loom everywhere in petitioner's case. Even petitioner's initial contact with Omar Hassan was through the Government's assignment of Omar as petitioner's paid *driver and interpreter.* It seems somehow ironic that when it came to conducting business on behalf of the Government, the Government thought petitioner required a driver and interpreter to find his way around the U.A.E. and intelligently converse with those same vendors the Government later said petitioner did not require any assistance in dealing with when attempting to defend himself against the Government. With regard to what the requested expert was required for, defense counsel clearly set forth several tasks, to include interviewing government witnesses and conducting background checks on these selfsame witnesses, locating and interviewing potential defense witnesses, and tracing documents relating to contracts originating in the U.A.E. Before the military judge, petitioner expressly identified witnesses that he'd tried, but failed to locate; he also stated their relevance to his case. Those who could have testified against Omar Hassan's credibility[4] were

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[4]One major discrepancy between Omar's testimony and that of the other vendors was how Mr. Nehnaha came to pay off an alleged promissory note of sorts to petitioner. Omar testified that he'd loaned Mr. Nehnaha the funds necessary to pay off the indebtedness, and that Mr. Nehnaha himself directly transferred these funds to petitioner. Record 1965. Mr. Nehnaha, on the other hand, testified that Omar told him he'd paid off his debt for him—that Omar had transferred payment to petitioner and that he, Mr. Nehnaha, later reimbursed Omar for that payment. Pursuant to Mr. Nehnaha's version, it certainly could be that Omar never paid petitioner anything, but merely represented that he had and then later pocketed the "reimbursement" from Mr. Nehnaha. Of course, Omar's version of events does not allow for this.

of particular importance. While both petitioner and Omar had conceded the taking of "kickbacks" from local vendors, they each pointed the finger at the other as being the one who ultimately received them. Credibility was everything, and it was important not only to locate and interview those with knowledge about Omar and his credibility, but also to conduct background checks on the other vendors who testified against petitioner. Equally important, especially in light of the Government's incomplete, illegible, and untranslated documentary evidence against petitioner, was an opportunity for the defense to track down and review any and all paper trails relating to petitioner's case. In this regard, the finding of the military judge illustrates her gross misappreciation for the issue she was being asked to address. For her finding that "[a]ny documents which are pertinent to the case were supplied by the government," ignores completely the possibility of a defense theory of the case differing from that of the Government and dependent upon evidence other than that obtained by the Government. Given the testimony of SA Pecko that no effort was made to obtain the completed originals of contracting documentation in issue, this finding was erroneous in fact as well as perspective.

Truly, petitioner's case was not an ordinary case; its unique circumstances made it such a case that, in accordance with the second prong of "necessity," a denial of investigative assistance rendered his trial a fundamentally unfair one. Petitioner was denied the services of even a single investigator for the brief period of just thirty days; the Government, on the other hand, over a period of eighteen months, employed a minimum of ten investigative agents along with an interpreter, translator, handwriting and fingerprint analysts to develop the Prosecution's case against him. At every phase of the proceedings, the prosecution had the benefit of their Government investigator. While half-a-

dozen investigative agents on behalf of the Government circumnavigated the globe in an effort to "enhance" the Prosecution's case, petitioner was denied even a single investigator to build his defense. Hence, of the thirty-two volumes comprising the record of trial in the instant case, the defense case-in-chief comprises a mere twenty-some pages and eight exhibits. See Record 2008–2029; Def. Ex. C-J.

To compound this serious error, the petitioner, Gary Washington suffered personally by this denial of investigative assistance since his trial defense counsel team were engaging in an adulterous relationship while representing their client. As found by the military judge during a post-trial Article 39a[5] session, Mr. Hammond Beale and Captain C. D. Horn engaged in an adulterous relationship during the period they were representing the petitioner.[6] Not only did the petitioner have to contend with the government using 10 investigative agents over an 18-month period to perfect their case while denying him the same access to investigative support to build his own defense, the petitioner was further harmed by his own defense counsel failing to devote their full attention to vigorously investigate his own case. Who could the petitioner turn to now? The government denied his request for investigative support, the military judge upheld that denial, and his own defense advocates were secretly engaging in an adulterous affair behind the petitioner's own back.

Petitioner contends that he fully and completely complied with the conditions pre-requisite set forth in *Garries* for investigative assistance, that his request for the assistance of an investigator over a mere thirty-day period was more

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[5]Article 39a, UCMJ. 10 U.S.C. 839.

[6]As a result of this adulterous relationship, Captain Horn received a Letter of Reprimand from her commander, then Colonel Hawley. Captain Horn shortly thereafter separated from the United States Air Force.

than reasonable under the extraordinary circumstances of his case, and that he made a proper showing of need. *United States v. Tornowski,* 29 M.J. 578 (AFCMR 1989), *rev. denied,* 30 M.J. 214 (C.M.A. 1990). It is patently clear that under the circumstances, petitioner was materially prejudiced by this erroneous denial which left him without adequate means to prepare for his Article 32 hearing, fully and completely cross-examine the witnesses in or locate witnesses for the deposition hearings, or develop a defense for his trial. Hence, the military judge abused her discretion and committed prejudicial error in concluding that "there is no reasonable probability that the requested services will be of assistance or that denial of the request will result in a fundamentally unfair trial." App. Ex. LIX. Such an abuse of discretion is further highlighted by the reasoning underpinning the decision of the court below in affirming the judge's ruling.

The reasoning of the court below in finding no abuse of discretion by the military judge displays a disturbing double standard in analyzing the unique problems generated by allegations of criminal misconduct arising in the Middle East. The court below ruled that the petitioner failed to demonstrate that an independent investigator was necessary to prepare a defense. Yet, the court, in finding that the Government was allowed to use Major Russell as the deposition officer despite his prior service as the Staff Judge Advocate during investigation of the underlying allegations, stressed the depositions were taken in the U.A.E. during Operation Desert Storm and involved foreign nationals. Further, the court opined that Major Russell was detailed to his deposition duties because of his particular experience and familiarity with the U.A.E., obviously a foreign country.

Though not initially bound together during the trial proceedings, the ruling of the court below as to the neutrality of the deposition officer must be reviewed in light of its

decision regarding the denial of the defense-requested independent investigator. The court below held that the statutory language of Article 49c, Uniform Code of Military Justice, that "[d]epositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths", was sufficiently broad to incorporate the impartiality provisions of Fed.R.Crim.P. 15(d) and Fed.R.Civ.P. 28(c). The court went on to conclude generally that these minimum standards of fairness apply to deposition officers in the military justice system and that the military judge erred in not applying them in the case *sub judice*. However, the court then refused to invalidate the petitioner's court-martial despite the judge's error, reasoning that although Major Russell had been involved in an investigative capacity early on in the case, his active participation had ceased prior to the depositions. In support of its reasoning, the court noted the depositions took place in the U.A.E. during Operation Desert Storm and involved foreign nationals. The court opined that since Major Russell was detailed to his duties *because* of his experience and familiarity with this foreign country, the requirement for personal disinterest may not have been controlling in petitioner's case. As a final justification for refusing to provide relief, the court concluded that Major Russell's duties were primarily ministerial in nature and that petitioner was "hard-pressed" to identify any particular conduct by Major Russell which substantially impacted on the depositions or his court-martial.

Though the United States Court of Appeals for the Armed Forces correctly held the military judge erred in failing to apply the impartiality provisions of the Fed.R.Crim.P. 15(d) and Fed.R.Civ.P. 28(c), the court erred in concluding the error was harmless. In addition to administering oaths, Rules for Courts-Martial (R.C.M.) 702(f)

lists nine separate duties to be performed by a deposition officer, including that he maintain order during the depositions and protect the witnesses from annoyance, embarrassment, or oppression; and that he report to the convening authority any substantial irregularity in the proceedings. R.C.M. 702(f)(3), and (9), respectively. The military judge and the court below both missed the mark when they focused upon the quantitative aspects of Major Russell's prior involvement in petitioner's case. The more important aspect was the qualitative one, i.e. the role which Major Russell played. That role was as Government counsel prosecuting petitioner. It was as counsel for the Government that Major Russell advised both the OSI and Colonel Rust on the legal aspects of the investigation against petitioner; he advised them as to the charges that could be levied against petitioner. As an attorney for the Government, he stood by Colonel Rust's side as his (Colonel Rust's) legal advisor when Colonel Rust, following Major Russell's advice, issued petitioner the no-contact order. As Government counsel, Major Russell reviewed the actual charges against petitioner; and as a Government attorney, he stood before petitioner and petitioner's counsel at the Jan '92 meeting designed to persuade them that they should "cave in" to the Government's case.

The United States Court of Appeals for the Armed Forces held in its decision below that the minimum standards of fairness contained within Fed.R.Civ.P. 28(c) apply to deposition officers in the military justice system, and that the military judge erred in applying them in this case. *United States v. Washington*, 47 M.J. 477, 483 (1997). However, contrary to the Court's finding that the deposition officer's duties were primarily ministerial, petitioner believes the duties of a deposition officer are more than ministerial. In particular, the duties to protect witnesses from annoyance and to report to the convening authority substantial irregularities demand the exercise of neutral and detached discretion: when

has a witness reached the point of annoyance?; what protective measures, if any, should be adopted to prevent such annoyance?; what is an "irregularity,"; and when is it "substantial?" Major Russell, *still* Government counsel at the time of the depositions, had discretion over matters which, as Government counsel, he should not have had. Indeed, if the duties of the deposition officer were truly ministerial in nature, why was the appointment of this one officer, Major Russell, specifically demanded by the Government to conduct the depositions against the petitioner.

The harm to the petitioner abounds throughout this case and the judge's error in countenancing Major Russell's appointment as the deposition officer must not be tolerated. Major Russell's first known act with regard to petitioner's case was to formulate and have executed the no-contact order isolating petitioner and undermining his ability to prepare a defense. Major Russell stood idly by as Colonel Rust angrily told petitioner he'd like to spit in his face and called him a Black Jew. The Major was also acting as the legal advisor to the OSI when it continued its interrogation of the petitioner despite his request for counsel (according to the petitioner's testimony at trial).[7] Major Russell rendered advice on the substantive content of the charges petitioner might face, and ultimately was tasked with ensuring the perfection of such charges. He actively engaged in efforts to trigger a defense "surrender" and played a part in the Government's failure to ensure petitioner's timely arrival for the depositions. In light of these actions by which Major Russell oversaw not only the impediment and discouragement of the defense, but also the hurling of face-to-face insults and debilitating orders levied personally against petitioner, it is simply incomprehensible

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[7]The court below agreed with the trial court that the OSI investigators did not improperly continue the interrogation as the trial court found the petitioner had not expressly requested counsel.

that Major Russell's impartiality was not reasonably subject to question and did not harm the petitioner. From petitioner's perspective, the selection of Major Russell as the deposition officer was a covert means of continuing the Government's efforts at an intolerable suppression of the defense. His experience was important to his selection – his experience as *Government counsel* seeking conviction on the charges he'd himself perfected.

Petitioner further submits that more than just having attached an appearance of impropriety to his case, Major Russell's service as the deposition officer substantially and materially prejudiced him. Major Russell's steadfast refusal to provide defense counsel and the witnesses an interpreter through which to conduct the proceedings severely disabled the defense and violated petitioner's due process rights by rendering petitioner's counsel unable to effectively cross-examine the Government's witnesses. Supposedly, Major Russell had been selected as the deposition officer due to the ability which his rank and prior experience would give him in dealing with the witnesses and the oddities of a foreign land. Yet, when it came time to put those special abilities to use by obtaining an appropriate interpreter, he simply wouldn't do it. As such, his failure to do so undercut the defense's ability to attack the credibility of key prosecution witnesses.

Additionally, the military judge erred in determining that, as a matter of law, the duties of a deposition officer are entirely ministerial. Further, as the Court below found, the military judge erred in implicitly holding, again as a matter of law, that a deposition officer may in fact be partial or biased—it's merely "preferable" that they're not. Applying an erroneous understanding of the law to unsupported conclusions of fact, the judge arrived at a prejudicially erroneous decision in finding that Major Russell's appointment as the D.O. had not been inappropriate, nor was

he disqualified from serving as such. Truly in the instant case, petitioner did his part to prevent this miscarriage of justice from occurring. Defense counsel lodged their first objection against Major Russell weeks before he'd even been appointed as the D.O. They renewed their objection at the start of the deposition hearings, before the taking of any substantive testimony. Finally, they timely raised their objection at petitioner's trial, before the deponents' testimony was ever introduced against him. Yet, the court below found no harm even though they reasoned that the *government* needed a deposition officer who was experienced and familiar with the U.A.E. all the while holding that the *petitioner* did not require an independent investigator to help prepare his defense. Surely, due process in today's military demands a more even-handed administration of justice for those who serve to defend our liberties. As ably demonstrated by petitioner's repeated appeals for assistance, the need for an independent investigator was fully justified by the unique circumstances of this case. For the United States Court of Appeals to support its ruling upholding the appointment of Major Russell because of unique circumstances present in the U.A.E. and then to refuse to disturb the denial of petitioner's request for assistance presents an intolerable affront to military due process.

CONCLUSION

The United States Court of Appeals for the Armed Forces erred in upholding the military judge's denial of the petitioner's request for investigative support even though the unique nature of conducting depositions of foreign nationals in the United Arab Emirates gave justification for the United States to use a deposition officer who initially investigated the allegations against the petitioner. Fundamental notions of due process require fair treatment for those who serve in this

nation's armed forces. Granting the petition for a writ of certiorari in the instant case would again demonstrate that "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service". *Weiss v. United States,* 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1997

APPENDICES

APPENDIX A

UNITED STATES, Appellee

v.

Gary A. WASHINGTON, Staff Sergeant
U.S. Air Force, Appellant.

No. 95–0721.

Crim.App. No. 30804.

U.S. Court of Appeals for
the Armed Forces.

Argued Oct. 1, 1996.

Decided Aug. 26,1997.

Accused was convicted by general court-martial, Mildred L. Raichle, J., of conspiracy to commit larceny, violating Air Force Regulations, larceny, extortion, impersonating an agent of superior authority, bribery, and graft. The United States Air Force Court of Criminal Appeals affirmed findings of guilty and sentence, except for confinement exceeding nine years and 99 days, 42 M.J. 547. Review was granted. The United States Court of Appeals for the Armed Forces, Sullivan, J., held that: (1) accused was not entitled to expert investigative assistance at government's expense; (2) accused's statement was voluntary; and (3) any error in appointment of deposition officer was harmless.

Affirmed.

1 Military Justice ⊶ 1210.1

Defense could not establish its inability to gather evidence in foreign country, as basis for granting expert

assistance at government's expense, simply by noting that prosecution employed expert assistance to prepare its case, or that case involved large number of complicated charges, where government arranged for defense access to prosecution's witnesses and documentary evidence, and there was no showing that this access was inadequate.

2. Military Justice ⚷ 1113

Agents' testimony accused never requested counsel and that check by request for counsel on rights form was clerical error supported determination that accused did not invoke his right to counsel during interrogation by agents of the Air Force Office of Special Investigations.

3. Military Justice ⚷ 1107, 1109, 1114

Accused's statements to agents of the Air Force Office of Special Investigations were voluntary, where accused was fully advised of his rights and affirmatively waived them several tones, any improprieties were relatively insignificant, and accused appeared to want to engage in verbal fencing with investigators.

4. Military Justice ⚷ 920

Deposition officer should be impartial and appear impartial. UCMJ, Art 46(c), 10 U.S.C.A. § 846(c).

5. Military Justice ⚷ 1424

Any legal error in appointment of deposition officer who was previously involved in investigative capacity early on in case, but whose active participation ceased prior to time of challenged depositions, was harmless, considering also that his actions were primarily ministerial, that depositions were

being taken in foreign country during military action and involved foreign nationals, and that deposition officer had particular experience and familiarity with foreign country. UCMJ, Art. 46(c), 59(a), 10 U.S.C.A. §§ 846(c), 859(a)

For Appellant: *Captain Todi S. Carnes* (argued); *Colonel Jay L. Cohen* (on brief); *Major Ormond R. Fodrea* and *Captain Eric N. Eklund* (on briefs).

For Appellee: *Captain Libby A. Brown* (argued); *Colonel Jeffery T. Infelise* and *Lieutenant Colonel Michael J. Breslin* (on brief); *Colonel Theodore J. Fink.*

Opinion of the Court

SULLIVAN, Judge:

In the summer of 1992, appellant was tried by a general court-martial at Shaw Air Force Base, South Carolina. Contrary to his pleas, he was found guilty of conspiracy to commit larceny (2 specifications), violating Air Force Regulations (2 specifications), larceny (4 specifications), extortion (2 specifications), impersonating an agent of superior authority, and bribery (4 specifications) and graft (2 specifications) totaling more than $70,000.00, in violation of Articles 81, 92, 121, 127, and 134, Uniform Code of Military Justice, 10 USC §§ 881, 892, 921, 927, and 934, respectively. On July 28, 1992, the members of his court-martial sentenced him to a bad-conduct discharge, confinement and forfeiture of $250.00 pay per month for 10 years, a fine of $70,000.00, and reduction to E–1. On August 11, 1993, the convening authority approved this sentence. The Court of Criminal Appeals affirmed the findings of guilty and the sentence, except for confinement exceeding 9 years and 99 days. 42 MJ 547, 563.

On March 13, 1996, this Court granted the following issues for review:

I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT WHEN SHE DENIED THE DEFENSE REQUEST FOR INVESTIGATIVE SUPPORT MADE UNDER THE AUTHORITY OF *UNITED STATES v GARRIES*, 22 MJ 288 (CMA 1986).

II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN DENYING THE DEFENSE MOTION TO SUPPRESS APPELLANT'S CONFESSION.

On May 8, 1996, we granted the following additional issue for review:

III

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN SHE DENIED THE DEFENSE MOTION TO DISMISS THE CHARGES AND SPECIFICATIONS ON THE BASIS THAT THE CONVENING AUTHORITY'S FAILURE TO APPOINT AN IMPARTIAL DEPOSITION OFFICER IN APPELLANTS CASE AMOUNTED TO A DENIAL OF DUE PROCESS.

We hold that no reversible error occurred in this case.

The Court of Criminal Appeals summarized the basic facts of this case as follows:

> All the alleged offenses arose out of the appellant's service as a contingency contracting officer at Al Dhafra Air Base in the United Arab

> Emirates (U.A.E.) from September 1990 through March 1991, during Operations Desert Shield and Desert Storm. According to the prosecution's evidence, the appellant, with the assistance of his driver, one Omar Hassan, solicited and accepted bribes and kickbacks from several U.A.E. businessmen as "commissions" for awarding (or influencing the award of) Air Force contracts, and threatened contractors with cancellation of their contracts unless they continued to pay him what he asked. The larceny and conspiracy convictions were based on evidence of collusion between the appellant and contractors to inflate prices, thereby increasing the contractors' profits and the appellant's "commissions."

42 MJ at 555–51.

[1] The first granted issue asks if the military judge erred in denying appellant's motion to dismiss the charges because the convening authority denied his pretrial request for investigative assistance. Appellate defense counsel summarizes the defense position as follows:

> Appellant contends that he fully and completely complied with the conditions prerequisite set forth in *Garries* for investigative assistance, that his request for the assistance of an investigator over a mere thirty-day period was more than reasonable under the extraordinary circumstances of his case, and that he made a proper showing of need. *United States v. Tornowski* , 29 MJ 578 (AFCMR 1989), [*pet.*] *denied*, 30 MJ 214 (CMA 1990). It is clear that under the circumstances, Appellant was materially prejudiced by this erroneous denial which left him without adequate means to prepare for his Article 32

> hearing, fully and completely cross examine the witnesses in or locate witnesses for the deposition hearings, or develop a defense for his trial.

We disagree. *United States v. Ndanyi* 45 MJ 315 (1996); *United States v. Garries, supra.*

In trial defense counsel's written pretrial motion, the following reasons were advanced for his earlier request for expert assistance:

> To justify why an investigator was needed, the Defense delineated several factors: *The large number of specifications; the complex nature of the alleged offenses; the situs of the offenses being overseas; the majority of Government witnesses being overseas, cultural and language barriers. . . .* As to what an investigator would be asked to do that would assist the Defense, several tasks were enumerated; *interviewing Government witnesses, and conduct background checks on Government witnesses; locate and interview potential Defense witnesses, trace documents relating to contracts originating in the UAE; trace receipts* for meals relating to travel voucher fraud. . . . The third prong is the reason why the Defense Counsel and Staff could not perform the tasks themselves. In response to this element, the Defense points out *the overwhelming amount of work that was required to investigate this case.* That does not include the volume of work necessary to prepare the case for trial. *The Government's Counsel was not required to investigate their case and prepare it for trial. The Government, in fact, had unlimited resources available to it. The Defense requested only one investigator; the Government had at least six AFOSI investigators working on this case at one*

time or another. The majority of work to be done by an investigator was to be done in the UAE. There have not been any military defense counsel in the UAE since mid-1991.

(Emphasis added.)

The military judge denied appellant's motion to dismiss, making the following findings of fact and conclusions of law

C. Denial of An OSI Investigator

In his request for investigative assistance, the accused cites the following as why an investigator is needed: the large number of specifications in the case, the complex nature of the offenses, the situs of the offenses in the United Arab Emirates (UAE), the location of the witnesses in the UAE, and the language and cultural barriers to be encountered in the UAE. The tasks enumerated as to what the investigator will do are to locate and interview witnesses for the government and for the defense, perform background checks on witnesses, and to trace contractual documents. The request indicates that the defense team is unable to perform these tasks because of the amount of travel necessary coupled with the defense counsels current case load.

The key to a successful demonstration of necessity for an investigator *is a plausible showing that the investigator could obtain information that the defense and its staff would not be able to obtain on its own.* I find that the defense has failed to make such a showing. The government made all its witnesses available to the defense when the parties were in the UAE for the videotape depositions. Any background checks which needed to be done could

> have been done by the defense team when they were in the UAE. Any documents which are pertinent to the case were supplied by the government. Finally, the defense appears to be on a "fishing expedition" as to defense witnesses who "may exist who can refute the charges" or "may be helpful." In this respect the defense has failed to show any more than a mere possibility of assistance.
>
> Accordingly, I find that there is no reasonable probability that the requested services will be of assistance or that denial of the request will result in a fundamentally unfair trial.

(Emphasis added.)

In *United States v. Gonzalez,* 39 MJ 459 (1994), this Court viewed favorably the three-step test articulated by the lower court for determining whether government-funded expert assistance was necessary. The lower court had said:

> There are three aspects to showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

Id. 39 MJ at 461. Later, in *Ndanyi* 45 MJ at 316, we held that the defense cannot reject expert military assistance supply because the prosecution employs expert civilian assistance. We reaffirm those decisions today and hold that the defense cannot establish its inability to gather evidence, even in a foreign country, simply by noting that the prosecution employed expert assistance to prepare its case.

Here, the Government arranged for defense access to the prosecution's witnesses and documentary evidence, and there

was no showing that this access was inadequate. In addition, the defense failed to justify its request for expert assistance, other than to generally say the case involved a large number of complicated charges arising overseas in a foreign country. Accordingly, we conclude that the military judge's decision to deny government-funded investigative assistance was not an abuse of discretion. *See Gonzalez,* 39 MJ at 461 (no error where government-provided interpreter was not used by defense to justify request for investigator in foreign country); Garries, 29 MJ at 291 (abuse-of-discretion standard).

II

[2] The second granted issue questions the military judge's decision admitting evidence of appellant's pretrial statements to agents of the Air Force Office of Special Investigations (AFOSI). Appellant objected to admission of this evidence on two grounds. First, he claimed that these statements were made by him after he requested and the agents refused to provide him with an attorney. Second, he asserted that the statements were unlawfully coerced by a combination of restraint, intimidation, threats, and promises by the AFOSI and Colonel Rust, his commander.[1] 42 MJ at 557–59.

The Court of Criminal Appeals noted that "[t]he military judge found the appellant had not requested a lawyer at any time during his AFOSI interrogation." *Id.* 42 MJ at 560. It noted the conflict of evidence on this question, stating:

> Agents Pecko and Bland resumed the interrogation the following morning, 7 March 1991, at about 0800. Again, Agent Pecko advised the appellant of his Article 31/Fifth Amendment rights and, again, the appellant waived them. At this point,

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[1] *See* 42 MJ at 554 n. 14.

the accounts of the appellant and his AFOSI interrogators diverge. Appellant claims that, sometime during the morning of 7 March, he asked for a lawyer. According to the appellant, Agent Pecko refused to honor the request or stop the interrogation. Appellant testified Agent Pecko told him that they did not have time for a lawyer, and offered to let him meet with Colonel Rust instead. Not surprisingly, Agent Pecko's version of these events is quite different. He testified that the appellant never requested a lawyer, but asked to see Colonel Rust on his own initiative. Agent Bland corroborates Agent Pecko's account. In any event, Agents Pecko and Bland then took the appellant to see Colonel Rust.

* * * * * * * * *

When the appellant had completed his handwritten statement, the agents used it to computer-print a double-spaced draft. Appellant reviewed the draft, and made corrections and revisions. The revised draft was then printed verbation on a standard AFOSI statement form. This form has preprinted Article 31/Fifth Amendment rights advice, and places where a suspect checks off his choices as to assertion of rights or waiver. Agent Pecko went through these rights again with the appellant, who then checked off his choices. At this point, the testimony conflicts one more time. All agree the appellant checked off the "I want a lawyer" block, but then scratched it out and checked "I do not want a lawyer." However, the appellant said he checked "I want a lawyer" because he wanted one, and only scratched it out because Agent Pecko told him he could not have one. Agent Pecko

> testified the appellant checked "I want a lawyer" as a clerical mistake, orally reiterated that he did not want a lawyer, and scratched the mark out for that reason. Once again, Mr. Lukens supports Agent Pecko's version. In any case, the appellant went on to review his printed statement, sign it, and take an oath to its truth. This completed the interrogation.

Id. 42 MJ at 558–59.

Appellate defense counsel before this Court still contend that "[a]ppellant *did* request counsel, and the military judge abused her discretion in finding otherwise." Final Brief at 44. However, this argument inappropriately invites this Court to make the factual findings necessary to support appellant's argument for suppression under *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). *See* Art. 67(c), UCMJ, 10 USC § 867(c)(1994). In addition, we note that the military judge, who did have power to decide the factual issues, conducted an evidentiary hearing and resolved them against appellant.

Ample evidence exists in the record to support the military judge's findings, so we are not persuaded that they are clearly erroneous. *See United States v. Melvin,* 91 F.3d 1218, 1222 (9th Cir.1996); *cf. Davis v. United States,* 512 U.S. 452, 458 60, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994). Finally, the Court of Criminal Appeals also concluded that the judge's decision was not clearly erroneous, and no argument has been presented that that court erred in declining to exercise its own factfinding power in this matter. *See United States v. Cole,* 31 MJ 270, 272 (CMA 1990); *United States v. Grostefon,* 12 MJ 431, 436 n. 8 (CMA 1982); *see also United States v. Burris,* 21 MJ 140, 143 n. 7 (CMA 1985).

[3] Appellant also argues that his motion to suppress his pretrial statements should have been granted because "under the totality of the circumstances . . . the Government failed to

prove by a preponderance of the evidence that [a]ppellant's confession was not the product of Government coercion and unlawful inducement." Final Brief at 43. He cites "a cold, sterile listing" of the facts surrounding appellant's confession as follows)

> a: Being roughly treated upon apprehension;
>
> b: Being denied the opportunity to speak with his supervisor as requested;
>
> c: Being subjected to an interrogation of two days' duration;
>
> d: Being told by his commander that he (the commander) wanted to spit in his face;
>
> e: Being verbally abused by this selfsame commander who called him a "black jew";
>
> f: Being promised "de facto" immunity by Colonel Rust if only he would execute a statement;
>
> g: Being repeatedly denied the opportunity to consult with counsel as requested;
>
> h: Being given a patently illegal order by Colonel Rust which cut him off from his friends and coworkers for the next year.

Final Brief at 38. He then concludes by stating, "Taking a holistic view of the human interaction occurring over the two days of interrogation, particularly that between appellant and Col Rust, it becomes self-evident that [a]ppellant's incriminating statements to the OSI on 7 March were the product of coercion and unlawful inducement." *Id.* at 39.

The military judge and the Court of Criminal Appeals both rejected appellant's argument that his statements were not voluntary. We review this question of law *de novo* and agree. *See United States v. Martinez*, 38 MJ 82, 86 (CMA 1993), citing *Arizona v. Fulminante*, 499 U.S. 279, 287, 111

S.Ct. 1246, 1252–53, 113 L.Ed.2d 302 (1991), quoting *Miller v. Fenton* 474 U.S. 104, 110, 106 S.Ct. 445. 449–50, 88 L.Ed2d 405 (1985). In our view, the court below more persuasively assessed the facts in this case as follows:

> Appellant had been fully advised of his rights, and affirmatively waived them, four times before he began his incriminating statements. In addition, he had been "reminded" of his rights another time. Before he signed and swore to his formal written statement, he was fully advice and waived his rights again. In comparison to such constant reinforcement of the appellant's rights, the length of the questioning and actions of Colonel Rust were insignificant. Moreover, the record portrays the appellant as a "cagey" operator (or at least someone who perceived himself to be so) who decided he would try to talk his way out of trouble. He willingly gave up his rights to "fence" with the AFOSI. Over the hours of questioning, the agents confronted the appellant with the evidence against him, piece by piece, to include playing the 6 March surveillance videotape. Appellant still chose to continue the duel, despite every opportunity to stop the interrogation. Eventually, the appellant decided he would acknowledge taking money from UAE vendors, but without admitting he was taking it for himself. As the appellant now undoubtedly realizes, these were all unwise choices. Nonetheless, they were his free and unconstrained choices.

42 MJ at 561.

III

The third granted issue asks whether it was error for the convening authority to appoint Major Russell as the deposition officer for purposes of deposing various witnesses

in the UAE. *See* Art. 49(c), UCMJ, 10 USC 849(c). The defense objected to this appointment, prior to the depositions and at appellant's trial, on the basis of Major Russell's earlier prosecutorial involvement in appellant's case. He construed Article 49(c) in accordance with Fed.R.Crim.P. 15(d) and Fed.R.Civ.P. 28(c) to strictly preclude depositions "taken before a person who is a relative or employee or attorney or *counsel of any of the parties,* or is a relative or employee of such attorney or counsel. . . ." (Emphasis added.)

The military judge denied appellant's motion to dismiss on the basis of a violation of his military due process rights. She made the following findings of fact and conclusions of law:

> 2) Impartial Deposition Officer
>
> RCM 702(f) sets out the duties of a deposition officer, one of which is to administer oaths to witnesses and the recorder. RCM 702(d) indicates that the deposition officer will be an officer. Thus, the only Manual requirements to be a deposition officer are that the person be an officer who is authorized to administer oaths. There is no requirement that a deposition officer act in a judicial capacity in the same sense as a military judge or Article 32 Investigating Officer. There is no requirement that the deposition officer have no prior involvement in the case. *However, it would be preferable if the deposition officer were impartial and unbiased.* In this case, Major Russell, the deposition officer, had been in the UAE acting as Staff Judge Advocate while the investigation was ongoing. The OSI in the UAE kept Major Russell advised of their progress in the Washington case, but most of their legal advice came from the main base office at Shaw. After his return to Shaw AFB,

> Major Russell was the Deputy Staff Judge Advocate but functioned mainly in a civil law capacity. Captain Joseph was the Chief of Adverse Actions and Major Russell had little to do with the Washington case. *Major Russell was selected as the deposition officer because of his prior experience in the UAE and his rank of major.* Under these circumstances and in light of the predominantly administrative nature of the duties of a deposition officer, I find that the appointment of Major Russell as the deposition officer was appropriate and he was not disqualified.
>
> Major Russell was properly appointed and his approval as deposition officer was made known orally to all parties, followed up by written confirmation. There is no evidence that any of the provisions of RCM 702 were violated.

(Emphasis added.)

[4] The Uniform Code of Military Justice does not expressly provide that a deposition will be taken before an officer who is impartial and appears impartial. Neither the Rules for Courts-Martial nor the Military Rules of Evidence provide an impartiality requirement. Nevertheless, Article 46(c) does provide the following.

> (c) Depositions may be taken before and authenticated by any military or civil officer *authorized by the laws of the United States* or by the laws of the place where the deposition is taken to administer oaths.

(Emphasis added.)

This statutory language is broad enough to incorporate the impartiality provisions of Fed.R.Crim.P. 15(d) and Fed.R.Civ.P. 28(c). In addition, we have generally recognized

the requirement of personal disinterest with respect to ministerial actors in the military justice system. *United States v. Donati,* 14 USCMA 235, 239, 34 CMR 15, 19 (1963) (as matter of basic fairness, court reporters and interpreters must have no personal interest in case). Accordingly, we conclude that these minimum standards of fairness apply to deposition officers in the military justice system, and that the military judge erred in not applying them in this case. *See generally* 3 Wigmore, *Evidence* §§ 802–03 at 266-67 (Chadbourn rev.1970) (deposition officer must not be "open to plain suspicion of bias or interest for one or the other of the parties").

[5] Nevertheless, we are not persuaded that appellant's court-martial should be invalidated simply because the military judge misconstrued the legal requirement that a deposition officer be impartial and appear impartial. *See* Art. 59(a), UCMJ, 10 USC § 859(a). Although Major Russell had been involved in an investigative capacity early on in this case, his active participation in this role, and hence his disqualification, ceased prior to the time of the challenged depositions. *Cf. United States v. Gaines,* 20 USCMA 557, 561, 43 CMR 397, 401 (1971). Moreover, these depositions took place in the UAE during Operation Desert Storm and involved foreign nationals. Since Major Russell was detailed to these duties because of his particular experience and familiarity with this foreign country, the requirement of personal disinterest may not have been controlling in appellant's case. *See United States v. Valli,* 7 USCMA 60, 64, 21 CMR 186, 190 (1956); *see generally United States v. Hessler,* 7 MJ 9, 10 (CMA 1979) (application of constitutional rights on front line of defense in foreign country). Finally, Major Russell's duties in taking these depositions were primarily ministerial (*see* RCM 702(f), Manual for Courts-

Martial, United States, 1984)[2] and appellant is hard-pressed to identify any particular conduct by this officer which substantially impacted on the depositions or his court-martial.

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[2](f) *Duties of the deposition officer.* In accordance with this rule, and subject to any instructions under subsection (d)(3) of this rule, the deposition officer shall:

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly:

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under RCM 703(e);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression:

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

Discussion

When any unusual problem, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.

The authority who ordered the deposition should forward copies to the parties.

See United States v. Yarbrough, 22 MJ 138 (CMA 1986).[3] In this context, we conclude that any legal error in the appointment of Major Russell as deposition officer in this case was harmless. Art. S9(a).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges CRAWFORD, GIERKE, and EFFRON concur.

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[3]Appellant's major complaint was that Major Russell failed to have an interpreter present at the taking of the deposition testimony as requested by defense Reply to Answer at 5, 8. He notes portions of the deposition where the foreign deponents had difficulties in communication. The Government responded that these difficulties were temporary and resolved by rephrasing the questions. We agree and see no prejudice in this context.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant GARY A. WASHINGTON, FR093–60–2294
United States Air Force

ACM 30804

21 April 1996

— M.J. —

Sentence adjudged 28 July 1992 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Mildred L. Raichle.

Approved sentence: Bad-conduct discharge, $70,000 fine, confinement for 10 years, forfeiture of $250 pay per month for 10 years, and reduction to E–1.

Appellate Counsel for Appellant: Mr. Vaughan E. Taylor, Esq. (argued), Colonel Jay L. Cohen, Captain Eric N. Eklund, and Captain Richard D. Desmond.

Appellate Counsel for the United States: Captain Timothy G. Buxton (argued), Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel, and Major John H. Kongable.

Before

HEIMBURG, PEARSON, and BECKER

Appellate Military Judges

OPINION OF THE COURT

BECKER, Judge:

Members convicted the appellant, contrary to his pleas, of six specifications of accepting or soliciting bribes or graft totaling over $70,000 (in violation of Article 134, UCMJ[1]), one specification of impersonating an agent of superior authority (also a violation of Article 134), two specifications of extortion (in violation of Article 127, UCMJ[2]), four specifications of larceny of currency, property of the United States, totaling over $20,000 (in violation of Article 121, UCMJ[3]), two specifications of violating Air Force Regulation 30–30 by soliciting or accepting gifts from contractors (in violation of Article 92, UCMJ[4]), and two specifications of conspiracy to commit larceny (in violation of Article 81, UCMJ[5]). Appellant was sentenced to a bad-conduct discharge, confinement for 10 years, forfeiture of $250 per month for 10 years, reduction to E–1, and a fine of $70,000. All the alleged offenses arose out of the appellant's service as a contingency contracting officer at Al Dhafra Air Base in the United Arab Emirates (U.A.E.) from September 1990 through March 1991, during Operations Desert Shield and Desert Storm. According to the prosecution's evidence, the appellant, with the assistance of his driver, one Omar Hassan, solicited and accepted bribes and kickbacks from several U.A.E. businessmen as "commissions" for awarding (or influencing

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[1]10 U.S.C. § 934 (1988).

[2]10 U.S.C. § 927 (1988). Appellant was acquitted of one other specification of extortion.

[3]10 U.S.C. § 921 (1988).

[4]10 U.S.C. § 892 (1988). Appellant was acquitted of two specifications alleging AFR 30–30 violations.

[5]10 U.S.C. § 881 (1988).

the award of) Air Force contracts, and threatened contractors with cancellation of their contracts unless they continued to pay him what he asked. The larceny and conspiracy convictions were based on evidence of collusion between the appellant and contractors to inflate prices, thereby increasing the contractors' profits and the appellant's "commissions."

Appellant asserts twelve assignments of error. Most prominent among them are that his trial defense counsel were ineffective, the court-martial was tainted by unlawful command influence, the military judge erred in denying his motion to suppress his incriminating statements to the Air Force Office of Special Investigations (AFOSI), and he was subjected to unlawful pretrial punishment in violation of Article 13, UCMJ.[6] We find no error affecting the lawfulness of the convictions, and affirm all findings of guilty. However, we agree with the appellant's Article 13 argument, and modify his sentence accordingly.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Background

This assignment of error calls upon us to consider the relationship, if any, between the Sixth Amendment and sexual activity between members of the defense team. Appellant's trial defense counsel were Mr. HAB, a civilian attorney practicing in Columbia, South Carolina, and Captain CDH, then Area Defense Counsel at Charleston Air Force Base, South Carolina. Captain H has since separated from the Air Force. Together, Mr. B and Captain H represented the appellant from the Article 32, UCMJ,[7] investigation in March 1992, through the nearly three-week trial at Shaw Air Force

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[6]10 U.S.C. § 813 (1988).

[7]10 U.S.C. § 832 (1988).

Base, South Carolina, in July 1992. This period included a three-week trip by Mr. B and Captain H to the U.A.E. to conduct depositions and other pretrial investigation. Due to problems obtaining a visa, the appellant did not at first accompany his counsel to the U.A.E., but arrived some days later.

Somewhere along the line—the appellant claims it was while his lawyers were alone in the U.A.E.—Mr. B (who was married) and Captain H (who was not) became romantically involved. Appellant stumbled onto this relationship after the trial, when Mr. B sent him a bundle of case materials. Obviously unbeknownst to Mr. B. there were cards and notes from Captain H to Mr. B tucked away in these files. These epistles, although not sexually explicit, certainly revealed an intimate, personal relationship.

Appellant seized upon this as proving that his lawyers did not adequately investigate and prepare his case while in the U.A.E., choosing instead to take advantage of the trysting opportunities presented by the trip. In the appellant's words, his lawyers "could not have had a better time on the 'Love Boat,"' and put his case "on the back burner if they considered it at all." He contends this is the reason his attorneys put on virtually no evidence on his behalf, during either the findings or the sentencing phase of the trial.[8]

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[8]In findings, the defense called only one witness, Colonel Rust. He was an adverse witness, whom the defense contended was responsible, in part, for coercing the appellant's statements to the AFOSI. Although the military judge had earlier denied the defense motion to suppress these statements, the defense called Colonel Rust as part of its attack on the weight the members should give the statements. In addition, the defense introduced several documentary exhibits during extensive cross-examinations of prosecution witnesses. Appellant did not testify in findings. In sentencing, the defense called no witnesses, but introduced several written statements from character witnesses and many other documents as mitigation evidence. Appellant made an unsworn statement in sentencing.

Specifically, the appellant argues his lawyers should have introduced testimony from other U.A.E. contractors who were willing to describe the appellant as an honorable person who did not solicit or accept bribes or kickbacks. He also contends that Mr. B and Captain H improperly struck a deal with the trial counsel to excise portions of certain videotaped depositions,[9] which he claims implicated his counsel in attempts to bribe witnesses during the trip to the U.A.E.

After the appellant found the love notes, his new civilian lawyers filed a motion for a post-trial Article 39(a), UCMJ,[10] session to consider the appellant's claim of ineffective assistance of counsel.[11] The prosecution opposed the motion. Before ruling, the military judge permitted discovery and submission of affidavits from all counsel. In their affidavits, Mr. B and now-Ms. H avoided any discussion of their personal relationship, and reviewed in detail their case preparation and reasons for tactical decisions. They described their efforts on behalf of the appellant as, in a word, monumental. In particular, they told of difficulties in preventing their client from bribing and threatening U.A.E. witnesses with deportation.[12] According to Mr. B and Ms. H. they decided—with the appellant's consent—to present very little evidence in either findings or sentencing, to prevent the

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[9]With only one exception, the U.A.E. witnesses refused the trial counsel's invitations to attend the court-martial at Shaw. *See* Article 46, UCMJ (10 U.S.C. § 846 (1988)); R.C.M. 703(e)(2)(A) (Discussion), (E)(i), (ii). Over defense objections, the military judge admitted the videotaped depositions of the unavailable witnesses as exceptions to the rule against hearsay. *See* Mill R. Evid. 804(b)(1). Appellant has not assigned these rulings as error.

[10]10 U.S.C. § 839(a) (1988)

[11]*See* R.C.M. 1102(b)(2).

[12]Although living and working in the U.A.E., the contractors involved in this case were citizens of either Saudi Arabia, Lebanon, or Germany, and were potentially subject to visa revocation and deportation for misconduct.

prosecution from introducing the appellant's threats and bribery attempts in rebuttal. The affidavits of the two defense counsel and the two trial counsel all say the editing of the depositions resulted from agreement that the bribery references were uncharged misconduct, which was not admissible against the appellant in the prosecution's case-in-chief. *See* Mil.R.Evid. 404(b), 403.

Based on the affidavits and other documents, the military judge found Captain H and Mr. B "did carry on an adulterous relationship during the period they were representing the accused." However, she denied the motion for a post-trial Article 39(a) session, ruling the appellant had not made out a claim of ineffective assistance of counsel.

B. General Rules and Standards of Review

We presume the competence of trial defense counsel unless an appellant points out errors which are unreasonable under prevailing professional norms. *United States v. Cronic,* 466 U.S. 648, 666 (1984); *United States v. Harris,* 34 M.J. 297, 299 (C.M.A. 1992). The appellant must show (1) his counsel's performance was so deficient that they were, in effect, not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) his counsel's errors were so serious as to deprive him of a fair trial, that is, a trial whose result is reliable. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *United States v. Scott,* 24 M.J. 186, 188 (C.M.A. 1987). A defense counsel's failure to investigate potential defenses may be ineffective assistance. *See, e.g., Scott.* However, we will not second-guess tactical decisions. *United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993); *United States v. Dale,* 39 M.J. 503, 506 (A.F.C.M.R. 1993).

An accused is entitled to defense counsel who are free from conflicts of interest. *Holloway v. Arkansas,* 435 U.S. 475

(1978); *United States v. Caritativo,* 37 M.J. 175, 178 (C.M.A. 1993); *United States v. Newak,* 24 M.J. 238 (C.M.A. 1987); *United States v. Breese,* 11 M.J. 17 (C.M.A. 1981). However, before an alleged conflict of interest may be the basis for a finding of ineffective assistance, an accused must demonstrate an *actual* conflict which *affected* his lawyers' performance. *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980).

C. Sex and the Sixth Amendment

Sexual conduct by defense counsel has, at times, created conflicts of interest implicating an accused's Sixth Amendment right to effective assistance of counsel. *See Barentine v. United States,* 728 F. Supp. 1241 (W.D.N.C. 1989), *aff'd,* 908 F.2d 968 (4th Cir. 1990) (defendant suffered no prejudice from potential conflict of interest created by defense counsel's affair with defendant's fiancee); *People v. Blalock,* 197 Colo. 320, 592 P.2d 406 (1979) (defendant denied effective assistance of counsel where defense counsel had prior sexual relationship with alleged sexual assault victim). Our research has disclosed no case involving a sexual relationship between defense counsel. However, in *United States v. Babbit,* 26 M.J. 157 (C.M.A. 1988), the Court of Military Appeals addressed the sexual relationship between a defense counsel and his client. We find that opinion instructive.

In *Babbit,* the accused (who was single) and her civilian defense counsel (who was married) become emotionally involved during the case, culminating in sexual intercourse on the night before the last day of the trial. On appeal, Captain Babbit argued this created a conflict of interest which denied her effective assistance of counsel. In affirming Babbit's conviction, the Court of Military Appeals rejected her argument that sexual relations between defense counsel and client *per se* create a conflict of interest which undermines

the Sixth Amendment guarantee of effective assistance. Instead, the court examined the record of trial, which revealed a thoroughly competent effort by the defense counsel, and agreed with the Army Court of Military Review that counsel's representation "'was, if anything, spurred on by his relationship with appellant.' [citation omitted]." 26 M.J. at 159.

We find the *Babbit* reasoning applicable here. We decline to adopt a rule that sexual relations between defense counsel during their representation of an accused *per se* create a conflict of interest which violates an accused's right to effective assistance of counsel. Such conduct (at least without the knowledge of the client), at a minimum, shows poor judgement and, as in this case, may be unlawful. Nonetheless, we must acknowledge that, similar to *Babbit,* certain aspects of a romantic relationship between counsel can work to a client's benefit. Certainly, it cannot be said the appellant's lawyers were not talking to each other. *Compare United States v. Mansfield,* 24 M.J. 611 (A.F.C.M.R. 1987) (counsel were ineffective because, among other reasons, they did not communicate regarding insanity defense preparations). Instead of invoking a *per se* rule, we will examine the record of trial and relevant post-trial exhibits, and apply the two-prong *Strickland /Scott* test.

D. Decision

The documented performance of the trial defense team belies any serious argument that they indulged in romance at the expense of case preparation. Their decision to keep a low evidence profile to avoid potentially devastating rebuttal is quite reasonable, and we will not play "Monday morning quarterback" with their professional judgement. The defense team's level of preparation in this complicated and difficult case was very high. Indeed, seldom has this Court seen a case

so energetically defended at the pretrial motions stage, where every significant piece of prosecution evidence was the subject of a motion to suppress or a motion *in limine*. During the prosecution case-in-chief, defense counsel rarely allowed a doubtful question from trial counsel to pass without objection. The defense also made aggressive, well-prepared attacks on the credibility of prosecution witnesses. This was especially the case for the deposition testimony videotaped in the U.A.E. at a time when, according to the appellant, his lawyers had put his case on the "back burner" to cruise on the "Love Boat."

The record also fails to show a conflict of interest created by either defense counsel's supposed connection with any bribery attempts by the appellant. The only reference we can find to such a connection is in the deposition of Omar Hassan, the appellant's driver. Hassan testified that he had kept the appellant's "commission" money in a box in his apartment until the appellant took the box. Also according to Hassan, the appellant owed him some of this money. During his deposition, Hassan described an encounter with the appellant and one of his lawyers (apparently, Mr. B), during which the appellant asked Hassan to "help me." Hassan replied:

> And in front of his lawyer I said, "I'm—if you want help, give me this box money back—give me what I tell you back." He said, "What?" I said, "Give me this box what I said back." And his lawyer, he said, "What box?" And Gary, he start to tell me what and his lawyer said, "Wait." He said, "What box." I said [to the lawyer] "Gary, he [referring to Gary] know what box. . . ."

This exchange raises no inference of involvement by Mr. B with any attempt to bribe Omar Hassan. To the contrary, it is apparent Mr. B was ignorant of the money box until this conversation, and sought to stop any further "negotiation" until

he could find out what was happening. We conclude that defense counsel were furthering only their client's interests when they and trial counsel agreed to edit this portion out of the Hassan video deposition before it was played to the members.

In sum, we find the appellant has failed to carry his burden of demonstrating the first prong of the *Strickland/Scott* test. There was no conflict of interest raised by either the relationship between the defense counsel, or by Mr. B's presence when the appellant and Hassan discussed the "box money." The record of trial reflects performances by both defense counsel which are well above the minimum required by the Sixth Amendment. Therefore, we resolve this assignment of error against the appellant without reaching the second prong of the *Strickland/Scott* test.

II. UNLAWFUL COMMAND INFLUENCE

A. Background

Appellant is highly critical of the attitudes and actions of three officers—Colonel Rust in the U.A.E., and Majors Blanchette and Biankini back at Shaw. He rolls all of his complaints into an allegation that his trial was tainted by unlawful command influence, in violation of Article 37(a), UCMJ.[13] At trial, he moved to dismiss all charges and specifications on this ground, but the military judge denied the motion.

Colonel Rust was in charge of logistics at Al Dhafra Air Base, which included the base contracting activities.[14] As

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[13]10 U.S.C. § 837(a) (1988)

[14]At various points in the record, Colonel Rust's position is described as the appellant's "commander," the "deputy commander for logistics," or like titles. Colonel Rust's precise title is not material. It is clear his authority included supervision of the contracting function at Al Dhafra.

such, he was a high-level supervisor of the appellant. After the appellant's apprehension in the U.A.E. on 6 March 1991, AFOSI agents interrogated him the rest of that afternoon and evening and, after an overnight break, on the morning of 7 March. On 6 March, Colonel Rust came into the interview room and spoke to the appellant. According to the appellant, Colonel Rust was insulting, told the appellant that he would like to spit on him, and called him a "black Jew." Appellant and Colonel Rust also met the next morning, although how this came about is in dispute.[15] Appellant claims Colonel Rust implied during this meeting that he would take care of the appellant's legal problems in return for his cooperation with the AFOSI. In his testimony, Colonel Rust admits he entered the AFOSI interview on 6 March, that he was upset, and that he told the appellant he would like to spit in his eye. Colonel Rust agreed that he met with the appellant the following morning, but said he made no promises other than for fair treatment and to contact the appellant's family. Colonel Rust denied personally calling the appellant a "black Jew," but admitted telling him during their 7 March conversation that local merchants referred to him by that epithet. On 6 March, Colonel Rust also gave the appellant a written order not to contact anyone in Contracting at Al Dhafra, or anyone in Abu Dhabi or Dubai. After completing his statement to AFOSI on 7 March, the appellant was taken to Riyadh, Saudi Arabia. Several days later, he flew back to Shaw, arriving on 22 March 1991.

After his return to Shaw, the appellant's commander (Major Biankini) assigned him to work in the squadron orderly room. He was not allowed in the Contracting Office to

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[15]This dispute becomes important in considering the voluntariness of the appellant's statements to the AFOSI. This issue is addressed in section III of this opinion.

pick up his personal effects. These were collected for him, and picked up by his wife.

On 10 July 1991, Major Biankini reassigned the appellant to work for the Noncommissioned Officer in Charge of the base Correctional Custody and Transition Flight programs, and gave him a written order not to make contact "in any way" with personnel assigned to the Contracting Office. The literal wording of this order was broad enough to prohibit even social contact between the appellant and his former co-workers. Appellant testified that he interpreted the order literally and, in one instance, he did not attend the annual Contracting Office family Easter Egg hunt because of the order.

Concerning his reassignment, the appellant was not actually placed in either the Correctional Custody or the Transition Flight program,[16] but he was required to sign in and out of the area. Appellant's duties included menial "weeds and seeds" tasks, such as landscaping, planting, and weeding. He also hauled trash, painted, and cleaned duck droppings from rocks at the base duck pond. Appellant performed these chores personally, and did not supervise lower-ranking airmen. Appellant claims Major Biankini reassigned him in retaliation for revealing unflattering information about her to his lawyers. According to other witnesses, Major Biankini issued the "no contact" order and reassigned the appellant after complaints that he was a disruptive influence in the

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[16]Correctional Custody is a type of punishment which commanders may impose under their nonjudicial punishment authority. *See* Article 15(b)(2)(B), (b)(2) (H)(ii), UCMJ (10 U.S.C. § 815(b)(2)(B), (b)(2)(H)(ii) (1994)); MCM Part. V ¶ 5(b)(2)(A)(ii), (b)(2)(B)(ii) (1984). "Transition Flight" is strictly a local-option program where commanders may assign airmen pending administrative discharge for cause.

orderly room and in Contracting, where he had been visiting his former co-workers.[17]

Major Blanchette was the chief of the Contracting Office at Shaw. Appellant alleges Major Blanchette's negative attitude toward him, in combination with Major Biankini's "no contact" order, hindered preparation of his defense. As an example, it was Major Blanchette who instructed office members that the appellant was not invited to the Easter Egg hunt. The Shaw wing commander rescinded all "no contact" orders on 1 April 1992, at the request of the appellant's defense counsel. At no time had Major Biankini's or Colonel Rust's orders affected the ability of appellant's attorneys to contact witnesses. Notwithstanding, the appellant claims Major Blanchette's continuing hostility resulted in reluctance among his former coworkers to come forward as favorable witnesses. Appellant introduced evidence of two specific instances in support of this contention. He and a former co-worker testified that, on one occasion, the appellant approached the worker in the office (apparently after the 1 April 1992 rescission of the "no contact" order), only to be rebuked by Major Blanchette for not letting him know in advance. In addition, the defense paralegal specialist assigned to the Shaw Area Defense Counsel office testified the squadron first sergeant had upbraided her for scheduling an appointment with a prospective witness which had disrupted the witness' lunch hour, and instructed her to go through him for future appointments. Further, two Contracting noncommissioned officers (NCOs) testified they had, at one time, feared repercussions from Major Blanchette if they helped the appellant. However, these NCOs admitted that neither Major Blanchette nor anyone else had directly said or

[17]Appellant also points to these actions in support of his claim of unlawful pretrial punishment, in violation of Article 13, UCMJ. We address this issue in section IV of this opinion.

done anything to cause such a fear. Other Contracting NCOs testified the appellant had met with Contracting personnel without hindrance (again, apparently after the wing commander had rescinded the "no contact" order), and they had no fear of retaliation from helping the appellant. On cross-examination, the appellant admitted he had talked to everyone in Contracting, except two civilian employees who had not served in the U.A.E. Appellant did not say what evidence he expected from these two civilians.

B. General Rules and Standards of Review

Unlawful command influence is the mortal enemy of military justice. *United States v. Thomas,* 22 M.J. 388, 393 (C.M.A. 1986), *cert. denied,* 497 U.S. 1085 (1987). Interference with an accused's access to witnesses is a form of unlawful command influence, when done under the mantle of command authority. *Id.* at 394; *see also United States v. Dykes,* 38 M.J. 270 (1993); *cf. United States v. Stombaugh,* 40 M.J. 208, 212–213 (C.M.A. 1994), *cert. denied,* —U.S. —, 115 S.Ct. 1113 (1995) (witness harassment by members of the unofficial "Junior Officers Protection Association" was not under mantle of command authority).

The burden of producing evidence of unlawful command influence is on the appellant. *Stombaugh,* 40 M.J. at 213. "[T]he threshold triggering further inquiry should be low, but it must be more than a bare allegation or mere speculation." *United States v. Johnston,* 39 M.J. 242, 244 (C.M.A. 1994). "[1]here must be something more than an appearance of evil to justify action by an appellate court in a particular case. 'Proof of [command influence] in the air, so to speak, will not do.'" *United States v. Allen,* 33 M.J. 209, 212 (1991), *cert. denied,* — U.S. —, 112 S.Ct. 1473, 117 L.Ed.2d 617 (1992). To carry this burden of production,

> . . . an appellant must (1) "allege [ ] sufficient facts which, if true, constitute unlawful command influence"; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness.... The same three-pronged analysis would apply to an allegation of unlawful interference with access to witnesses.

Stombaugh, 40 M.J. at 213 (quoting *United States v. Levite,* 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J., concurring)).

Once an appellant satisfies his burden of production, the burden of proof is on the government to disprove the allegation. *Stombaugh,* 40 M.J. at 213–214. We must then be "persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." *Thomas,* 22 M.J. at 394; accord *Stombaugh,* 40 M.J. at 214.

If a command influence issue has been addressed at trial, we will defer to the military judge's findings of fact, unless they are clearly erroneous. *See United States v. Wallace,* 39 M.J. 284, 286 (C.M.A. 1994). However, whether "unlawful command influence" flows from those facts is a question of law, which we review *de novo. Id.*

C. Decision

The appellant has carried his burden of production as to the first prong of the *Levite-Stombaugh* test. He introduced the orders from Colonel Rust and Major Biankini, and testified the orders prevented him from personally contacting potential witnesses. He also produced testimony from two Contracting NCOs to the effect that the atmosphere in the office was poisoned against the appellant, and they feared adverse career consequences if they helped him. Finally, the Shaw defense paralegal's clash with the first sergeant over appointment

procedures might be argued as command interference with access to witnesses. In denying the appellant's motion to dismiss, the military judge found "no evidence of command influence, either actual or perceived." We do not agree with this conclusion. Viewed in the light most favorable to the appellant, the evidence is sufficient to cross the low threshold for satisfying the first prong of the *Levite-Stombaugh* production test—if the appellant's factual allegations were true, they would constitute unlawful command influence.

However, the appellant has failed to carry his burden of producing evidence as to the second *Levite-Stombaugh* prong, that is, to show that the proceedings were unfair. The record shows quite the contrary. Clearly, neither Colonel Rust's actions nor his "no contact" order had any effect at all on the appellant's access to witnesses. The evidence shows the appellant was whisked away from the U.A.E. to Riyadh, Saudi Arabia, soon after his AFOSI interrogation had been completed. After several days stay in Riyadh, the appellant returned to Shaw. Appellant offered no evidence about what he could have or would have accomplished in the U.A.E. had Colonel Rust not issued his "no contact" order. Moreover, the appellant had unrestricted access to the Air Force Area Defense Counsel in Riyadh, and did meet with him. Colonel Rust's order, of course, had no effect on the ability of any defense attorney to contact potential witnesses. Turning to the Biankini "no contact" order at Shaw, this order also did not purport to limit access by the appellant's defense lawyers to anyone in the Contracting Office. The record is clear that counsel had such access, despite the defense paralegal's tiff with the first sergeant over a single witness' appointment. On 1 April 1992, the Shaw wing commander rescinded both the Rust and Biankini orders. At this time, the appellant could personally contact his former co-workers, apparently subject only to Major Blanchette's requirement of that he check in

first with either him or another supervisor. By the appellant's own admission, he personally contacted everyone at the Shaw Contracting Office he wanted, except for two civilian employees who had no firsthand knowledge of any events in the Gulf. Regarding the allegedly poisoned atmosphere in Contracting, all witnesses agreed that neither Major Blanchette nor any other supervisor had said or done anything to send the message that someone helping the appellant would suffer harm. The two NCOs who testified they had such a concern obviously were not deterred from testifying in support of the appellant's motion to dismiss. According to the appellant's trial defense counsel, the decision to keep a low evidence profile was motivated by fear of prosecution rebuttal, and not because character witnesses were unavailable. As a matter of strategy, the appellant and his counsel chose to litigate this trial primarily by pretrial motions intended to exclude as much incriminating evidence as possible, and then to impeach the weight of that which went before the members. Appellant executed this strategy fully and fairly.

Because the appellant has failed to carry his burden of production as to the second *Levite-Stombaugh* prong, we need not reach the third part of that test—whether he produced evidence that the unlawful command influence was the proximate cause of the unfairness. Accordingly, we find beyond a reasonable doubt that, even assuming the appellant's factual allegations are true, neither the findings nor the sentence of his court-martial were tainted by unlawful command influence.

III. APPELLANT'S STATEMENTS TO THE AFOSI

Appellant contends the military judge should have suppressed his statements to AFOSI agents on two grounds. First, he claims the agents violated his right to counsel by

continuing interrogation in spite of his request for a lawyer. Second, he asserts his statements were unlawfully coerced by a combination of restraint, intimidation, threats, and promises by AFOSI and Colonel Rust.

A. Background

Appellant was apprehended by Special Agent Pecko and other AFOSI agents on the afternoon of 6 March 1991, after a "sting" operation. This operation was designed to record the appellant on videotape accepting a gold bracelet and money—both of which having been distinctively marked by AFOSI—from a U.A.E. vendor, and apprehend the appellant with the bracelet and money in his possession. The "sting" was not an unqualified success. The videotape (with sound) shows the appellant examining a bracelet, asking what the marks (made by the AFOSI) mean, and trying it on. However, the appellant ends up giving it back to the vendor. The videotape then shows the vendor handing something to the appellant, which he puts in his pocket, but it is impossible to tell what the item is. However, a search of the appellant incident to his apprehension just outside the vendor's shop recovered the marked money from his pocket. After the apprehension, the AFOSI drove the appellant to Al Dhafra Air Base. Although the appellant was not free to go, he was not in handcuffs or similar physical restraints.

Back at Al Dhafra, Agent Pecko interrogated the appellant, with the assistance of Special Agent Bland, the rest of the afternoon and evening of 6 March 1991. Before beginning the interview, Agent Pecko advised the appellant of his rights under Article 31, UCMJ,[18] and the Fifth Amendment, including his right to consult with and have an attorney present during questioning. Appellant waived his

[18]10 U.S.C. 831 (1988).

rights and agreed to answer questions. Throughout the remainder of the 6 March questioning, the appellant denied any wrongdoing and resisted providing any meaningful information. It was during this stage of the interrogation that Colonel Rust entered the room and made the remarks described above. Before speaking to the appellant, however, Colonel Rust advised him of his Article 31/Fifth Amendment rights, which the appellant again waived. After Colonel Rust finished his remarks and left the room, Agents Pecko and Bland continued the questioning. Agent Pecko broke off the interrogation at about 2200 hours. Appellant was escorted to a private room in visiting officers' quarters, where he spent the night with a Security Policeman posted outside his door.

Agents Pecko and Bland resumed the interrogation the following morning, 7 March 1991, at about 0800. Again, Agent Pecko advised the appellant of his Article 31/Fifth Amendment rights and, again, the appellant waived them. At this point, the accounts of the appellant and his AFOSI interrogators diverge. Appellant claims that, sometime during the morning of 7 March, he asked for a lawyer. According to the appellant, Agent Pecko refused to honor the request or stop the interrogation. Appellant testified Agent Pecko told him that they did not have time for a lawyer, and offered to let him meet with Colonel Rust instead. Not surprisingly, Agent Pecko's version of these events is quite different. He testified that the appellant never requested a lawyer, but asked to see Colonel Rust on his own initiative. Agent Bland corroborates Agent Pecko's account. In any event, Agents Pecko and Bland then took the appellant to see Colonel Rust.

At Colonel Rust's office, the colonel again advised the appellant of his Article, 31/Fifth Amendment rights, which the appellant again waived. Appellant asked to talk to Colonel Rust someplace else, and the colonel suggested they take a ride in his vehicle. Here again the accounts differ. According

to the appellant, Colonel Rust implied during their ride that he would make everything go away if the appellant cooperated with the AFOSI. Colonel Rust testified that the appellant became emotional and was worried about his family. The colonel conceded that he urged the appellant to cooperate with the AFOSI. However, he denied promising anything in exchange for the appellant's cooperation, except fair treatment and to contact the appellant's father. After this conversation, Colonel Rust returned the appellant to the custody of Agents Pecko and Bland. Agent Pecko reminded the appellant of his rights, and resumed the questioning. Shortly after this, Special Agent Lukens replaced Agent Bland as Agent Pecko's assistant.

At this point, the appellant began offering specific information, including admissions that he had taken money from U.A.E. vendors. However, the appellant maintained he had not personally accepted bribes and kickbacks. Instead, he claimed the money was for Omar Hassan. Appellant then made a handwritten statement. Appellant alleges he merely wrote down what the AFOSI agents told him to write. According to Agent Pecko, he reminded the appellant to write on certain topics he had discussed orally, but he insisted the handwritten statement had been in the appellant's own words. Mr. Lukens (now retired from the Air Force) corroborated Agent Pecko's testimony.

When the appellant had completed his handwritten statement, the agents used it to computer-print a double-spaced draft. Appellant reviewed the draft, and made corrections and revisions. The revised draft was then printed verbatim on a standard AFOSI statement form. This form has preprinted Article 31/Fifth Amendment rights advice, and places where a suspect checks off his choices as to assertion of rights or waiver. Agent Pecko went through these rights again with the appellant, who then checked off his choices. At

this point, the testimony conflicts one more time. All agree the appellant checked off the "I want a lawyer" block, but then scratched it out and checked "I do not want a lawyer." However, the appellant said he checked "I want a lawyer" because he wanted one, and only scratched it out because Agent Pecko told him he could not have one. Agent Pecko testified the appellant checked "I want a lawyer" as a clerical mistake, orally reiterated that he did not want a lawyer, and scratched the mark out for that reason. Once again, Mr. Lukens supports Agent Pecko's version. In any case, the appellant went on to review his printed statement, sign it, and take an oath to its truth. This completed the interrogation.

At trial, the military judge denied the defense motion to suppress the appellant's oral and written statements, concluding that the appellant had voluntarily waived his right to counsel, and there was no evidence of "unlawful inducement, coercion, or unlawful influence." Adopting the factual averments in the prosecution's brief, she found that the appellant had not requested a lawyer on 7 March, but had asked to see Colonel Rust, and that the appellant's mark at the "I want a lawyer" block on his written statement had been a clerical error. In addition, the military judge found that Colonel Rust had, on 6 March 1991, been "very upset and told the accused that he was very disappointed in him and could spit in his face . . . [and] also advised the accused that he was known downtown as a 'black Jew.' Further, on 7 March 1991, [Colonel Rust] advised the accused that if the accused cooperated with the OSI, he would call the accused's father and explain the situation and make sure that the accused was treated fairly." The military judge found that the "spit in your face" remark was not a threat, and did not make the accused's later statements involuntary. She also adopted the prosecution's factual averments concerning the conditions of the interrogation into her findings and, based on the totality

of the circumstances, concluded the appellant's statements were voluntary.

B. General Rules and Standards of Review.

An involuntary statement may not be admitted in evidence against an accused. Mil.R.Evid. 304(a). A statement is "involuntary" if it is obtained in violation of the Fifth Amendment or Article 31, UCMJ, or by coercion, unlawful influence, or unlawful inducement. Mil.R.Evid. 304(c)(3). When a suspect asks for a lawyer, the Fifth Amendment requires that the questioning immediately cease. *Edwards v. Arizona,* 451 U.S. 477 (1981); Mil.R.Evid. 305(f). Promises from superiors or law enforcement personnel are unlawful inducement, if the promises are such that the suspect's ensuing decision to speak is not a "free and unconstrained choice." *United States v. Lonetree,* 35 M.J. 396, 401 (C.M.A. 1992), *cert. denied,* ___ U.S. ___, 113 S. Ct. 1813 (1993); *United States v. Churnovic,* 22 M.J. 401, 409 (C.M.A. 1986) (Cox, J., concurring). *See also United States v. Dalrymple,* 14 U.S.C.M.A. 307, 34 C.M.R. 87, 90 (1963). Whether an accused made such a free and unconstrained choice is determined by considering the totality of the circumstances. *Arizona v. Fulminante,* 499 U.S. 279 (1991); Lonetree, 35 M.J. at 400.

When an accused claims an interrogation violated his rights to counsel, we review the military judge's ruling applying an abuse of discretion standard. *United States v. McLaren,* 38 M.J. 112, 115 (C.M.A. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1056 (1994). However, if an accused contends his statement was the product of coercive police activity, we will review that issue *de novo. Fulminante,* 499 U.S. at 286–287; *United States v. Moore,* 38 M.J. 644, 647 (A.F.C.M.R. 1993). In applying either standard, we will defer to the military judge's findings of fact unless they are clearly

erroneous. *United States v. French,* 38 M.J. 420, 424–425 (C.M.A. 1993), *cert. denied,* — U. S. —, 114 S.Ct. 1056 (1994).

C. Decision

The military judge found the appellant had not requested a lawyer at any time during his AFOSI interrogation. These findings are not clearly erroneous. We find the military judge did not abuse her discretion in denying the motion to suppress on that ground.

The military judge's factual findings concerning the alleged coercion are also not clearly erroneous, and we accept them. At first blush, these facts are a little troubling. In particular, we are concerned about the length of the interrogation and the role of Colonel Rust.

The length of an interrogation is an important factor in whether a statement is voluntary. *See United States v. Houston,* 15 U.S.C.M.A. 239, 35 C.M.R. 211, 217 (1965); *United States v. Rogers,* 14 U.S.C.M.A. 570, 34 C.M.R. 350, 374 (1964) (Ferguson, J., concurring in part and dissenting in part); *United States v. Tanner,* 14 U.S.C.M.A 447, 34 C.M.R. 227, 230 (1964). However, lengthy questioning does not per se undermine the voluntariness of a statement, if the conditions of the interview otherwise show the statement was the product of free and unconstrained choice. *See United States v. Robinson,* 21 M.J. 937, 944–945 (A.F.C.M.R. 1986), *aff'd,* 26 M.J. 361, 366–367 (C.M.A. 1988), *cert. denied,* 488 U.S. 1005 (1989). In this regard, the record and the military judge's findings reflect a businesslike setting, periodic breaks for necessities and a meal, and an overnight break where the appellant had an opportunity for a full night's sleep in a comfortable room.

We are not impressed with Colonel Rust's contributions to the appellant's interrogation on 6 March 1991. The record is unclear how and why Colonel Rust ended up inside the interview room. If this was AFOSI's idea of an interrogation technique, it was a bad one. If it was Colonel Rust's notion, Agent Pecko should have put a stop to it.[19] We defer to the military judge's findings that Colonel Rust's "spit in your face" and "black Jew" comments were not threats. Nonetheless, they unquestionably were in poor judgement and, coming from a senior officer, no doubt intimidating. We note, however, that Colonel Rust did advise the appellant of his Article 31/Fifth Amendment rights before his speech, and the appellant waived those rights. Also, Colonel Rust's involvement on 6 March was brief, and the appellant's eventual decision to provide information to AFOSI was separated by many hours, including an overnight break.

We view Colonel Rust's actions on 7 March 1991 in a more sympathetic light. As found by the military judge, it was the appellant who wanted to see Colonel Rust and suggested they go someplace else to talk. Colonel Rust advised the appellant of his rights before their conversation and, once again, the appellant waived his rights. As found by the military judge, the only promises Colonel Rust made to the appellant were for fair treatment and to call the appellant's father. These were innocuous promises and, by themselves, did not affect the voluntariness of the appellant's subsequent statements. *See, e.g., Rogers,* 34 C.M.R. at 363–364 (promise' to check out other leads); *United States v. Askew,* 14

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[19]This incident illustrates why we have an independent Air Force Office of Special Investigations, staffed with full-time, trained criminal investigators. When AFOSI agents discard this autonomy and allow local commanders (or other senior officers like Colonel Rust) to inject themselves into their investigations, issues such as those presented here are inevitable.

U.S.C.M.A. 257, 34 C.M.R. 37, 42 (1963) (dictum) (promise to check out ordinary lead); *United States v. St. Clair,* 19 M.J. 833 (N.M.C.M.R. 1984) (promise to contact ship's legal officer and ask if accused would be restricted). *Compare Lonetree* (promise of confidentiality was unlawful inducement); *Churnovic* (promise of no disciplinary action was unlawful inducement); *United States v. Handsome,* 21 U.S.C.M.A. 330, 45 C.M.R. 104 (1972) (implied promise of leniency was unlawful inducement); *Dalrymple* (promise of immunity was unlawful inducement); *Askew* (promise not to question wife raised issue of voluntariness).

Considering the totality of the circumstances, we agree with the military judge that the appellant's statements to the AFOSI were voluntary. Appellant had been fully advised of his rights, and affirmatively waived them, four times before he began his incriminating statements. In addition, he had been "reminded" of his rights another time. Before he signed and swore to his formal written statement, he was fully advised and waived his rights again. In comparison to such constant reinforcement of the appellant's rights, the length of the questioning and actions of Colonel Rust were insignificant. Moreover, the record portrays the appellant as a "cagey" operator (or at least someone who perceived himself to be so) who decided he would try to talk his way out of trouble. He willingly gave up his rights to "fence" with the AFOSI.Over the hours of questioning, the agents confronted the appellant with the evidence against him, piece by piece, to include playing the 6 March surveillance videotape. Appellant still chose to continue the duel, despite every opportunity to stop the interrogation. Eventually, the appellant decided he would acknowledge taking money from U.A.E. vendors, but without admitting he was taking it for himself. As the appellant now undoubtedly realizes, these were all unwise choices. Nonetheless, they were his free and unconstrained

choices. The military judge did not err in denying the motion to suppress.

IV. UNLAWFUL PRETRIAL PUNISHMENT

A. Background

Many of the facts supporting the appellant's pretrial punishment claim are in our discussion of the command influence issue. *See* section II.A., *infra.* Appellant argues these actions were intended to punish him for the offenses he allegedly had committed and, in the case of Major Biankini's reassignment of him to the Correctional Custody and Transition Flight (CC&T-Flight) program, also as retaliation for revealing unfavorable information about the major to his attorneys.

The prosecution countered with testimony that neither Colonel Rust nor Major Biankini took action with punitive intent, but for legitimate command purposes. Concerning Colonel Rust's U.A.E. "no contact" order, the stated purposes of that order were to preserve the integrity of the pending investigation and prevent an international incident in the sensitive period following the Gulf War. Regarding Major Biankini's "no contact" order, Major Blanchette testified that, considering the nature of the investigation, it was inappropriate for the appellant to continue his contracting duties, and that the appellant's contact with Contracting Office personnel was having a deleterious effect. Concerning the appellant's reassignment to CC&T-Flight, the Shaw staff judge advocate (Lt Colonel Winborn) testified he advised Major Biankini to reassign the appellant after she informed him that the appellant had been disruptive in the orderly room. However, Lt Colonel Winborn provided no details how the appellant had been disruptive, or why CC&T-Flight had been selected as the appellant's new duty section. Major

Biankini testified by way of stipulation, and did not appear in person. Her stipulated testimony addressed primarily the chronology of events. It did not directly rebut the appellant's retaliation claim, but includes the statement that "At that time [of the appellant's reassignment from the orderly room], I did not have enough work to keep SSgt Washington busy."

The record contains no indication that, before the Article 32 investigation in March 1992, the appellant had ever formally complained about the conditions of his duties or any other aspect of Colonel Rust's or Major Biankini's orders. During oral argument of the command influence issue before this Court, the appellant's counsel conceded his client had made no such complaints.

The defense raised the issue of unlawful pretrial punishment at trial in a motion to dismiss. The military judge denied the motion, finding that:

> . . . [the] housekeeping tasks around the base . . ., while not glamorous, certainly did not rise to the level of demeaning or degrading. Nor can I fault the accused's commanders for taking him out of his work section, considering the nature of the alleged misconduct. The orders were in furtherance of the valid military purpose of maintaining good order and discipline in the unit and to prevent obstruction of justice.

B. General Rules and Standards of Review

In *United States v. Palmiter,* 20 M.J. 90 (C.M.A. 1985), the Court of Military Appeals set out the process for evaluating alleged Article 13 violations:

> [T]he question of whether particular conditions amount to punishment before trial is a matter of intent, which is determined by examining the

> purposes served by the restriction or condition, and whether such purposes are "reasonably related to a legitimate governmental objective." [Citation omitted].
>
> "[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective."

20 M.J. at 95 (quoting *Bell v. Wolfish,* 441 U.S. 520, 539 (1979)). Therefore, we will apply a two-part test to the facts of this case:

1. Did Colonel Rust or Major Biankini intend to punish the appellant by either "no contact" order, or by the reassignment to CC&T-Flight?

2. If there was no punitive intent, did these orders and the reassignment further a legitimate nonpunitive governmental objective?

In addressing the second prong, we are also mindful that "the reasonableness of the conduct designed to secure the nonpunitive government objective must also be considered." *United States v. Cruz,* 25 M.J. 326, 331 n.4 (C.M.A. 1987). *See also Palmiter,* 20 M.J. at 99–100 (Everett, C. J., concurring).

The parties have spent much effort arguing the legality of Colonel Rust's and Major Biankini's "no contact" orders. It should be clear from the Palmiter rule that the abstract legality of these orders is not a threshold issue. If orders or other actions independently violate law or regulation, that may be a reason to infer a punitive intent or reject an asserted nonpunitive objective. *See United States v. Villamil-Perez,* 32 M.J. 341, 343 (C.M.A. 1991) (posting of incident report on bulletin board violated Army regulation). However, an

otherwise lawful action still violates Article 13, if it is intended as punishment or does not reasonably relate to a legitimate nonpunitive governmental objective.

Issues of pretrial punishment are not waived, either expressly before trial or by failure to raise them at trial. *See Cruz,* 25 M.J. at 330–331 (failure to raise); *Palmiter,* 20 M.J. at 96 (express pretrial "waiver"). However, a servicemember's failure to complain of conditions before trial is "strong evidence" that the member has not been illegally punished. *Palmiter,* 20 M.J. at 97. *See also United States v. Huffman,* 40 M.J. 225, 227 (C.M.A. 1994); *United States v. James,* 28 M.J. 214, 216 n.4 (C.M.A. 1989).

Neither the Court of Appeals for the Armed Forces nor this Court has formally stated the standard of review for trial rulings on Article 13 issues. The government suggests our standard of review should be *de novo.* We agree. In our view, the non-waivable nature of Article 13 violations is more consistent with a *de novo* review than with an abuse of discretion standard. *But see United States v. Phillips,* 38 M.J. 641, 642 (A.C.M.R. 1993) (abuse of discretion standard applied to Article 13 ruling). As with other types of trial rulings, we will defer to the findings of fact by the military judge unless they are clearly erroneous. *United States v. Burris,* 21 M.J. 140, 144 (C.M.A. 1985). However, as with unlawful command influence issues, whether unlawful pretrial punishment flows from those facts is a question of law for this Court.

C. Decision

We can dispose of Colonel Rust's U.A.E. "no contact" order quickly. There is no evidence of any punitive intent. The intended purposes of the order—to avoid compromise of an ongoing investigation and a potential international incident in the aftermath of the Gulf War—were obviously legitimate

nonpunitive governmental objectives. Colonel Rust's order reasonably related to those objectives. Therefore, we find the appellant was not subjected to unlawful pretrial punishment while in the U.A.E. or Saudi Arabia.

Major Biankini's "no contact" order and the reassignment to CC&T-Flight at Shaw are another matter. There is no satisfactory explanation in the record for the order extending beyond official contact to social activity. There are no specific examples of "disruptive" acts by the appellant, or an explanation why they required his reassignment instead of appropriate discipline. The prosecution presented no evidence explaining how CC&T-Flight was selected as the appellant's new duty section, instead of another place not generally identified with punishment or where the appellant could exercise responsibilities more in line with his grade. We are especially concerned with the prosecution's failure to rebut the appellant's testimony that Major Biankini had reassigned him after learning he had passed on embarrassing information about her to his defense counsel.

From these facts, we infer that Major Biankini's actions were at least partially motivated by a desire to punish the appellant. We agree with the military judge that the appellant's "weeds and seeds" duties were not *per se* demeaning or degrading, but that is not the test. Under *Palmiter,* if duties are intended as punishment, then an Article 13 violation follows, even if the work is not inherently distasteful.

Even if we could get past the intent prong of the *Palmiter* test, we do not see the CC&T-Flight assignment as reasonably serving a legitimate nonpunitive purpose, at least without an explanation of why other duties were not available. Moreover, the record reveals no legitimate nonpunitive purpose for an order preventing all association between the appellant and his former co-workers, even in social settings.

We are mindful that, before his Article 32 investigation, the appellant never formally complained about his working conditions and the breadth of the "no contact" order. We acknowledge this is normally strong evidence against a finding of unlawful pretrial punishment. However, we will not resolve this issue against an appellant, based solely on his failure to complain when there is a clear inference of punitive intent, or when the evidence discloses no legitimate nonpunitive purpose that is reasonably served by the pretrial conditions.

We find the appellant was subjected to pretrial punishment in violation of Article 13, UCMJ, from 10 July 1991 to 1 April 1992 (the date the Shaw wing commander rescinded the "no contact" orders). Appellant was still assigned to CC&T-Flight on 1 April 1992. However, the record shows that, by this date, the appellant's commanders had allowed him the flexibility to work more or less full time with his attorneys in preparing his defense. We conclude, therefore, that the appellant's unlawful pretrial punishment ended on 1 April 1992.

At trial, the appellant moved for dismissal based on this Article 13 violation. This was not the correct remedy, as unlawful pretrial punishment only affects an accused's sentence, if he is convicted. *See Cruz*, 25 M.J. at 331. Appellant now asks for sentence relief, first in the form of setting aside the sentence and ordering a rehearing, and in the alternative for a two-year credit to the appellant's confinement. We do not believe a rehearing is warranted, and will address the appropriate remedy ourselves. *See United States v. Smith*, 17 M.J. 1089, 1091 (A.F.C.M.R. 1983). In our decretal paragraph, we will reduce the appellant's confinement one day for every one of the 266 days of unlawful pretrial punishment.

V. REMAINING ISSUES AND DECISION

Appellant's remaining assignments of error are without merit. We affirm all findings of guilty. Because of the Article 13 violation, we affirm only so much of the approved sentence that extends to a bad-conduct discharge, confinement for 9 years and 99 days, forfeiture of $250 per month for 10 years, reduction to E–1, and a fine of $70,000.

The findings and sentence, as modified, are correct in law and fact. Accordingly, they are

AFFIRMED.

Senior Judge HEIMBURG and Judge PEARSON concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court

APPENDIX C

Relevant Extract of the Testimony of Lt Colonel Winborn as Contained at Record 369-370, 371, 373-377

Q: So colonel, what was the advice you gave the convening authority?

A: . . . Based on the experience I've had in the—in the middle east, I was stationed in Saudia [sic] Arabia for two and a half years, and I'm familiar with—over there they called it Bak Shish or kickbacks. The—it really is a very simple case when it comes down to it.

It's unlike cases we've had in the past where OSI investigators have been appointed to – help the defense. This is a very simple case. It's a question of fact with one person's word against another. There'll be no documentary evidence. There won't be an audit trail in any way. It will be simply one witness' word against another.

* * * *

A: . . . in the letter requesting that an OSI investigator be appointed, the defense cited that there was a need for introductions. I didn't feel that that was sufficient reason for an OSI investigator because the people in the middle east, many of them speak English. It's not an alien culture. An American can—can fit in very well in the middle east and . . .

* * * *

Q: Did you think it was important that the defense be able to do background checks on the witnesses that the government proposed to use?

* * * *

A: It's a—it is very important to understand the background of your witness, but the background check that the defense

requested, they never outlined what background check they wanted to perform.

* * * *

Q: Colonel, you asked for a more detailed explanation and on 6 April 1992, Captain Horn gave you that detailed explanation, and you said, if I understand correctly now, the first thing is you didn't understand what she meant by the fact of background checks?

A: I—I did not know how you defined as a background check.

Q: Well then how could you intelligently decide whether that was a good reason if you didn't know what she meant?

A: Mister Beale, I think you should move beyond background check and . .

Q: No sir, I'm not through with the background check yet, colonel. Now, I want to keep talking about that, if you don't mind.

A: Could you intelligently decide . . .

TC: Objection to the characterization, making a decision is that individual's decision.

MJ: I'll overrule the objection.

CDC: Thank you, your Honor.

Q: Colonel, if you did not understand the necessity of an OSI investigator, the basis for the request, how could you intelligently inform the convening authority to deny that request?

A: I did understand the basis for your request.

Q: Okay. Well, then background check. You just testified a minute ago, you're under oath, that you didn't understand what background check meant.

A: I did not understand what you meant by background check.

Q: Okay, did you bother to ask the defense what you all mean by this?

A: No.

* * * *

Q: In the request, colonel, it was specifically put in there that—quote—the investigator will be utilized to research the paper trail of each contract and to track funds paid to each contractor—end quote. Did you understand that language?

A: Yes I did.

Q: And did you think that that was not essential to a case like this?

A: It—it's essential to understand the contracting process and the audit trail . . .

Q: Well, what about.

A: . . . but that is something that the defense counsel, the—A-D-A [Area Defense Administrator, i.e. defense paralegal] resources available to the defense can do that. In addition . . .

Q: What resources are available to the A-D-A?

A: In addition, the defense counsel has the resources of OSI available to them.

Q: What—what is that. I'm sorry. Would you tell me what that is? What access does A-D-A have that he can go and order an OSI agent to come and work on the case?

A: The A-D-A cannot order an OSI . . .

Q: Well how—how does the A-D-A get one? Has to go through you and the convening authority. Isn't that true? Isn't that what the Manual provides?

A: Mister Beale, I think you're misleading the court. If you want to go over and look at contractual documents, you can

do that at any time. If you want Mister Pecko to review contractual documents for you, he can review those contractual documents for you, he can review those contractual documents at any time. The . . .

Q: Have you ever been a trial lawyer?

* * * *

TC: Objection, relevance.

* * * *

MJ: What is the relevance?

* * * *

CDC: The relevance is that he's telling us that he wants us to use the government investigator as our investigator, and if he's a trial lawyer, and he knows anything about trials, you don't use the other side to investigate your case.

MJ: I'll sustain the objection.

Q: Is it your suggestion that the defense should have used Agent Pecko as their investigator?

A: That's not my suggestion that you use Agent Pecko.

Q: Well, what are you saying?

A: My experience in cases like this in the past through my experience in Saudia [sic] Arabia and through extensive discussions with both O-S-I and C-I-D on similar cases in the middle east is that there's no paper trail, no audit trail, there would absolutely be no documentary evidence within a company showing payment of a kickback. It will be simply one person's word against another.

Q: In this particular case, Sergeant Washington is alleged to have been involved in numerous contracting activities while in the U.A. E., wasn't he?

A: Yes.

Q: And that contracting activity would have generated paperwork over there in the U.A. E., would it not?

A: Yes.

Q: Do you know, of your own personal knowledge, what paperwork the contractors, the ones we—that they did business with, do you know what paperwork they have?

A: No.

Q: And if they had paperwork dealing—pertaining to their dealings with Sergeant Washington, that could be important to Sergeant Washington's defense, could it not? Could.

A: It could.

Record 369–370, 371, 373-377.